1989

Department of the Air Force v. Board of Review of the Industrial Commission of Utah and William R. Comer : Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DEPARTMENT OF THE AIR FORCE, Petitioner, vs. BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH AND WILLIAM R. COMER Respondents	Case No. 89-0115CA PRIORITY CLASS 6

BRIEF OF PETITIONER

ON REVIEW FROM THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION

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JURISDICTION

This court has jurisdiction to hear this matter pursuant to Section Three, Article Eight of the Utah Constitution and Utah Code Annotated 78-2-2(3)(a).

The Claimant, William R. Comer, applied for and was denied unemployment compensation following the termination of his employment by the employer Petitioner, The United States Air Force. His claim was then heard by an Administrative Law Judge who reversed the Department's prior determination. The employer appealed to the Board of Review who sustained the Administrative Law Judge. The employer filed a petition for review.

The ruling of the Administrative Law Judge and the decision of the Board of Review have been reproduced as attachments A and B respectively and are included in the back of this brief.

ISSUES PRESENTED FOR REVIEW

1. Was the decision of the Board of Review contrary to the facts in the record?

2. Were the regulations which were applied reasonable and did they subserve the statute they were created to enforce?

DETERMINATIVE LAW

This case turns on the following law, reproduced as attachments, and included in the back of this brief.

Attachment C: Executive Order 12584

Attachment D: Utah Code Annotated 35-4-5

Attachment E: Industrial Commission Rules

STATEMENT OF THE CASE

Mr. William R. Comer's employment with the United States Air Force was terminated on September 5, 1988, see record at 40. He applied for unemployment insurance benefits which were denied in a decision dated October 3rd, 1988, see record at 38. A hearing was held on his appeal on October 31st and November 1st, 1988, see record at 35. The administrative law judge reversed the prior determination and awarded Mr. Comer benefits in an order dated November 2, 1988. That decision was upheld by the Board of Review in its decision dated January 17, 1989.

Mr. Comer was a boiler mechanic, wage grade 10 see record at 53, 79. Because of the area in which he was employed he was required to have a security clearance, see record at 55.

Mr. Comer was terminated after the Air Force was notified that he had sold cocaine to an undercover agent and he was arrested, while on duty on Air Force property, after the conclusion of an undercover into allegations of his involvement in drug sales and use on base, see record at 43, 57, 80. The Air Force had previously been made aware, on August 16, 1988, that Mr. Comer was the subject of a drug investigation based on events which took place on Air Force property, see record at 43. The investigation involved a Mr. Stuffelbeam, an Air Force employee, who advised Air Force authorities that Mr. Comer had encouraged him "to participate in some illegal drug use". see record at 44, 63, 73. Mr. Stufflebeam further stated that he had observed drugs in Mr. Comer's possession while at work, see record at 73. Air Force authorities were advised by Mr. Stuffelbeam that Mr. Comer had invited him, while on the job, to use cocaine, see record at 64. Another Air Force

employee, Mr. Boren, was sold drugs by Mr. Comer, see record at 44, 46, 80. Mr. Comer acknowledged his drug involvement, see record at 2, 9, 12. Mr. Comer was arraigned on a charge of distribution of a controlled substance, a second degree felony, and pled guilty to a third degree felony, see record at 30, 48, 49, 75, 76.

Mr. Comer appealed his termination to the Merit Systems Protection Board, see record at 42.

Air Force policy holds its employees responsible for drug offenses on or off base, see record at 12, 50, 68, 74, 113. The policy suggests termination of employees charged with drug offenses, see record at 60, 70. The policy has been reiterated by various commanders over a long period of time including occasions when Mr. Comer was personally advised of the policy by his commander, see record at 52, 87.

SUMMARY OF ARGUMENTS

Under the appropriate standard of review, much of the decision of the Board of Review may be disregarded.

The actions of Mr. Comer in selling cocaine, not only allowed, but required, the employer to discharge him. That discharge, having met the three criteria, was for just cause under the statute and related rules.

Mr. Comer's actions, in selling cocaine, were intentional and adverse to the interests of his employer and his status as a federal employee.

The Unemployment Security Act and interpretive regulations are intended to assist those out of work through no fault of their own, a category which does not include the claimant.

The Board of Review's decision is not supported by the record.

By his actions in selling cocaine Mr. Comer lost required certification.

ARGUMENT

I

TWO STANDARDS OF REVIEW APPLY

A

FACTUAL DETERMINATIONS MUST BE SUPPORTED BY THE EVIDENCE

As with reviews of other administrative agencies this court gives deference to facts determined by the agency at the hearing level if they are supported by the evidence. Where they are not supported no such difference is given. In Hurst v. Board of Review of the Ind. Com'n, 723 P2d 416, 419 (Utah, 1986) the Utah Supreme Court described this deference. "On questions of fact, the Commission's findings are conclusive and not subject to review by this Court unless they are without substantial support in the record and thus clearly arbitrary and capricious." Several "facts" contained in the decision of the Board of Review are without such support.

At page 123 of the record the board concludes that "The incident had occurred away from the Air Force base during off-duty hours and did not involve other Air Force employees." The record of the hearing in fact shows that Mr. Comer was arrested on Air Force property during duty hours, record at page 78. It is also uncontroverted that the investigation initiated on Mr. Comer was commenced because of evidence of on base drug involvement, record at 78. The record also shows that one of the people to whom Mr. Comer sold drugs was a federal co-worker, record at 80. The record shows no denial by Mr. Comer of his admissions in the OSI report that he used cocaine and

sold it to his friends, record at 20, 80. The erroneous finding impacts the boards subsequent ruling of no employment connection

At page 124 of the record the board concludes that, once having preliminary, hearsay, evidence of Mr. Comer's drug involvement "The employer's failure to act indicates it did not consider Comer's prior conduct to be culpable." This finding is without support in the record because the uncontroverted evidence is that the Air Force immediately commenced an investigation to substantiate the information it had received, record at 78. The action the Air Force took is exactly the one a just and prudent employer would take. The boards approach suggest that an employer should fire now and ask questions later. This erroneous finding impacts the boards subsequent culpability determination in its just cause analysis.

Both of the findings listed above should be disregarded under Hurst because they are without substantial support in the record and thus arbitrary and capricious.

B

LEGAL CONCLUSIONS RECEIVE NO DEFERENCE

Appellate jurisdiction and procedure for rulings made by the Board of Review are provided for by U.C.A. 35-4-10. The statute provides that findings of fact, unless clearly erroneous, are conclusive and that review is limited to conclusions of law. This matter is thus subject to the general rule of the law of appeal and error to the effect that this court need give no deference to the conclusions of law reached below, Kimball v. Campbell, 699 P2d 714 (Utah, 1985). The legal conclusions reached by the Board of

Review are in error and do not follow from the evidence presented at the hearing.

The Board held, at pages 123 and 124 of the record, 1. There was no showing that the claimants actions had a connection with the employees duties or the employer's business interests, and 2. Mr. Comer's termination was not for just cause. The employer was not represented by an attorney at the hearing. The employer did articulate numerous reasons, all supported by adequate evidence which would require the denial of benefits. That the Board of Review chose to focus its decision on the nexus and just cause issues should not bind the employer to those legal theories where evidence was presented which would require denial of benefits on other theories.

The legal conclusions listed above are in error when viewed in light of the evidence presented at the hearing and should result in reversal of the board's decision.

II

THE CLAIMANT WAS TERMINATED FOR JUST CAUSE

Rule R475-5b1-2 defines just cause as having three elements a. culpability, b. knowledge, and c. control.

A. CULPABILITY

Rule R475-5b1-2(1)(a) establishes general criteria for culpability. "The wrongness of the conduct must be considered in the context of the particular employment and how it affects the employer's rights." In analyzing culpability we must remember who the parties are. The employer is the United States Government, the employee is a mechanic whose employment required a security clearance.

The rights of the employer, pertaining to drug offenses, are broader than those of any other conceivable employer. This is the employer who, during the month Mr. Comer's appeal was heard, passed the National Narcotics Leadership Act of 1988, Public Law 100-690, filling 364 pages. The United States Government has waged war on drugs on many different fronts. One of the major problem areas addressed has been drugs in the military. The record shows that Mr. Comer was admonished by the commander of the organization employing him that drug involvement would not be tolerated. Those warnings, coupled with the United States Government's major offensive on drugs constitute major employer rights.

Attached hereto as Attachment C is a copy of Executive Order 12584, issued by the President of the United States on September 15, 1986 entitled "Drug Free Federal Workplace. That Executive Order establishes national policy for all federal employees, Mr. Comer included. The Executive Order establishes national policy by ordering certain actions by federal employees and federal employers.

In the findings section of the Executive Order the President finds that illegal drugs, on or off duty, 1. are inconsistent with the public trust placed in federal employees, 2. lessen effectiveness of those employees involved, 3. impairs the efficiency of government employers, and 4. is inconsistent with access to sensitive information. Mr. Comer was required to have a security clearance and was arguably in the category of people defined by the Executive Order to be in sensitive positions.

The Executive Order directs federal employers, Mr. Comer's included, to initiate action to remove offending employees. The employers are authorized to proceed on the basis of any appropriate evidence, conviction is not required. The offending employees retained their industrial due process rights under the Civil Service Reform Act. The Air Force's actions against Mr. Comer were required by and comported with Executive Order 12584.

The Executive Order also issues specific directions to federal employees. They are required to refrain from the use of illegal drugs (and by logical extension the sale of those drugs). The Executive Order refers only to the use of drugs, not to the consumption of drugs. It follows that anyone who sells drugs has used them even if they are in that rare category of drug dealers who have not consumed them.

It takes little imagination to envision the public outcry which would arise if this federal employer failed to terminate the employment of drug peddlers on it's payroll.

This case should be compared to that of Clearfield City v. Dept. of Employment Sec., 663 P2d 440 (Utah 1983). There an off duty police officer was denied benefits after having been charged with sodomy. The court ruled that special status of the employer held the employee to a higher standard than might be required of other employees. (The policeman was ultimately acquitted or the sodomy charge). In citing another case of an employee of the federal government the Utah Supreme Court said, at 443, ". . . a public or private employer has the right to expect his employees to refrain from acts which would bring dishonor on the business name or the institution." The court also cited another public employment case denying benefits ". . .

the claimant had deliberately disregarded a statute which his employer had the affirmative duty to administer and enforce." Public Law 100-690 places such a responsibility upon the United States Department of Defense and accordingly upon the Air Force.

The ruling of the Board of Review would require the Air Force to continue to employ Mr. Comer and those of his ilk until it could establish that they used them while working on supersonic jet aircraft, or be punished for terminating them.

B. KNOWLEDGE

Rule R475-5b1-2(1)(b) discusses the knowledge element of just cause. The uncontroverted evidence is that Mr. Comer, and his coworkers were told by their employer that no drug involvement would be tolerated. Mr. Comer had knowledge that he would be subject to discipline for selling drugs.

C. CONTROL

Rule R475-5b1-2(1)(c) discusses the control element of just cause. The issue is whether or not the employee had the ability to prevent the acts which led to his termination. No one but Mr. Comer controlled of whether or not he sold cocaine.

All of the elements for a just cause discharge under Rule R475-5b1-2 were met in Mr. Comer's termination. His just cause termination does not entitle him to unemployment benefits. The regulation requires that just cause be examined in light of the particular employment involved. This particular employment is more sensitive to drug involvement than almost any

conceivable. Any showing of culpability is sufficient to meet the just cause.

III

THE CLAIMANT WAS TERMINATED FOR WILLFUL AND WANTON ACTS ADVERSE TO HIS EMPLOYER

The Appellant firmly believes that the actions of the claimant fit within the parameters of both the statute and the regulation pertaining to acts constituting a crime with an employment nexus shown. If the court reaches the conclusion that Mr. Comer's acts do not constitute a crime it must nonetheless deny benefits because the Claimant's acts were willful and wanton and adverse to the employer's rightful interest, as that term is used at U.C.A. 35-4-5(b)(1).

III

THE RULE UNDER WHICH THE CLAIMANT WAS GRANTED BENEFITS DOES NOT REASONABLY RELATE TO THE PURPOSE OF THE EMPLOYMENT SECURITY ACT

A

THE RULE DOESN'T SUPPORT THE ACT

While this court must give deference to the Industrial Commission's rules and there interpretation that deference does not apply if the rule is not reasonable. In West Jordan v. Department of Employment Sec., 656 P.2d 411, 412 (Utah, 1982) the Utah Supreme Court said ". . . agency decisions are still subject to judicial review and will be reversed where they are inconsistent with the governing legislation or the decision so this Court."

The stated purpose of the Employment Security Act is to benefit the ". . health, morals, and welfare of the people of this state", U.C.A. 35-4-2.

The description of that purpose was amplified by the Industrial Commission in rule R475-2-1(1) "One of the purposes of the Employment Security Act is the lighten the burdens of persons unemployed through no fault of their own..." The "through no fault of his own" language of the rule was apparently taken directly from the Utah Supreme Court's holding in Olof Nelson Const. Co. v. Industrial Commission, 121 Utah 525, 243 P.2d 951, 958 (1952). The "through no fault of his own" language in the both the rule and the Olof Nelson case state the purpose of the act. The clear, uncontroverted evidence is that Mr. Comer claimant was in complete control of his actions and chose to sell drugs. His discharge and resulting unemployment was not "through no fault of his own". He had a secure job with the most complete set of industrial due process rights existing any where in the world yet chose to deliberately flout his employers clearly stated policy against any drug involvement. The health, morals and welfare of the people of this state are not uplifted in any fashion by requiring the federal government to employ drug dealers.

The application of the departments rules in a fashion which allows Mr. Comer to receive benefits is contrary to the stated intent of the statute and the Supreme Court's prior decisions interpreting it.

B

THE RULES ARE RANDOMLY APPLIED

Attached hereto as Attachment F is a copy of the Board of Review decision in Johnson v. Industrial Commission, Case number 880703-CA. In that case the Board of Review upheld the Administrative Law Judge's decision not to allow benefits where an employee violated his employers drug and alcohol policy through off base use.

The employer's drug and alcohol policy could not be any more strict in Johnson than in this case yet the Board of Review failed to take The Air Force's policy into account. In Johnson the Board of Review relied upon the claimant's violation of state drug laws, including U.C.A. 58-37-8, but refused to give an identical argument any weight here. This is despite the claimant's specific admission to the sale of cocaine at the time he applied for benefits, see record at 2.

The fact that Mr. Comer was discovered to have been involved with drugs through and undercover buy from him does not lessen the application of the legislative finding, stated at U.C.A. 34-38-1, that a drug free work force is a laudable goal. The Board of Review's sustaining the employer in it's attempts to achieve this goal in Johnson only makes its failure to do so in this case that much more mystifying.

While the appellant is not arguing that the Johnson case is precedent in this case the Board of Review's application of different rules to similar circumstances can only lead to the conclusion that the rules are not reasonable and rationally applied as required by the Supreme Court in the West Jordan case.

IV

THE RULE UNDER WHICH THE CLAIMANT WAS GRANTED BENEFITS DOES NOT REASONABLY RELATE TO THE PURPOSE OF THE EMPLOYMENT SECURITY ACT REGULATIONS

Industrial Commission Rule R475-2-1(1) was cited in the next proceeding section as stating the legislative intent of the Act. As the preamble, that rule also states the intent of the rest of the unemployment compensation

regulations. That intent is to provide relief for persons unemployed "through no fault of their own". For the reasons stated in section A of the next preceding section of this brief Mr. Comer's actions should deny him benefits because his loss of employment was through his own fault.

VI

THE FACTS IN THE RECORD DO NOT SUPPORT THE BOARD'S RESULT

The Board of Review was required to rely upon the facts within the record. The Administrative Law Judge and the Board of Review both ignored uncontroverted evidence which require denial of benefits. That evidence includes

(a) The claimant's admission of distribution of cocaine, record at 2, 3, and 80 showing dishonesty, actions constituting a crime, and violation of his employer's stated policy on drugs.

(b) The claimant's industrial due process rights before the Merit Systems Protection Board, see record at 42, showing that his discharge was for just cause,

(c) The individual to whom he sold cocaine was a co-worker, record at 80 showing work involvement,

(d) The claimant's understanding of the employer's explicit no drug policy, see record at 52, 87 showing culpability and just cause for dismissal.

(e) The Air Force has a strong anti-drug policy, see record at 12, 50, 68, 74, and 113, showing that off base drug sales are work related.

VII

THE CLAIMANT WAS DISCHARGED FOR DISHONESTY CONSTITUTING A CRIME

U.C.A. 35-4-5(b)(2) denies the claimant benefits if he was discharged for dishonesty constituting a crime. Commission Rule R475-5b2 elaborates. "A crime is a punishable act in violation of law: an offense against the State or the United States", R475-5b2(1). R475-5b2(3) lists the elements as a. in connection with work, b. dishonesty, and c. admitted or established by a conviction in a court of law.

As shown above in the discussion on "Just Cause" the claimant's actions in selling cocaine were in connection with work. This follows from the fact that his employer is charged by the United States Congress with eradicating drug abuse, the fact that he, and his fellow employees, had been advised that any drug involvement would result in termination.

Neither the Act nor its regulations define dishonesty. It is therefore appropriate to examine other common legal definitions of the term. Black's Law Dictionary does not define honest or honesty. It does define dishonesty as "Disposition to lie, cheat or defraud; untrustworthiness; lack of integrity." The first synonym for honest listed by The Random House Thesaurus, College Edition, is "law abiding". The act of selling cocaine is chargeable as a second degree felony under U.C.A. 58-37-8. It is also a crime chargeable under 21 U.S.C. 841. The latter statute being enacted by the United States of America, the employer of Mr. Butler. The natural, logical definitions of dishonesty include the claimant's actions.

The only issue remaining is whether his actions were admitted or established by a conviction in a court of law. The record shows Mr. Comer's acknowledgment of his crime as well as the fact that he had plead guilty to a drug related offense. The board acknowledged that his actions constituted a crime, record at 124.

The actions of Mr. Comer meet the statutory definition of dishonesty constituting a crime and should result in denial of benefits.

VIII

THE CLAIMANT LOST HIS LICENSE

Rule 475-5b-8(5) includes among appropriate reasons for discharge "When an employee loses a license which he knows is required for the performance of the job, and the individual had control over the circumstances which resulted in the loss of the license, such conduct is disqualifying."

As a mechanic Mr. Comer was required to have a current restricted area clearance. The uncontroverted evidence is that the Air Force Security Clearance Office suspends the security clearances of drug offenders, see record at 66. The Security Clearance Office is not under the control of Air Force Officials at Hill Air Force Base and that office's independent action constitutes a lose of license under the rule.

The respondent may argue that suspending Mr. Comer's security clearance is an act over which the employer had control and may not be used as an independent ground for termination. The logical extension of that argument is that the State of Utah will never be justified in terminating a driver under this regulation because the Department of Motor Vehicles is an agency of the state.

CONCLUSION

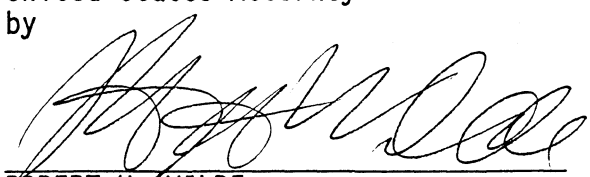
The Board of Review in this action completely ignored relevant law, facts in the record, and commonly used definitions of words in order to award Mr. Comer unemployment benefits. Mr. Comer admitted selling cocaine. That sale constituted adequate grounds to allow any employer to terminate an employee for cause and to deny benefits.

In this case other special facts make the Board of Review's decision even more inappropriate. First, Mr. Comer had substantial industrial due process rights. Had he truly felt he was being unjustly terminated he could have followed that process, while remaining on the payroll. Second, Mr. Comer, and his fellow federal employees, are held to a higher standard because of the special status of their employer. Mr. Comer was informed of this by his commander. All federal employees are presumed to have notice of this by virtue of Executive Order 12584.

Mr. Comer's termination, without benefits, was appropriate under the majority of operative provisions of the Departments Regulations. The denial of benefits is clearly supported by the evidence while the granting of benefits is not. The decision of the Board of Review should be reversed and benefits denied.

Dated this 30th day of May, 1989

DEE V. BENSON
United States Attorney
by



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ATTACHMENTS

Attachment A: Administrative Law Judge Ruling
Attachment B: Board of Review Decision
Attachment C: Executive Order 12584
Attachment D: U.C.A. 35-4-5
Attachment E: Industrial Commission Rules
Attachment F: Board of Review decision in Johnson v. Industrial Commission, Case Number 880703-CA

THE INDUSTRIAL COMMISSION OF UTAH
DEPARTMENT OF EMPLOYMENT SECURITY

Appeals Tribunal

Decision of Administrative Law Judge

William R. Comer 4364 Palmer Road Erda, Utah 84074	:	S.S.A. No. 528-08-6111 Case No. 88-A-04707

APPEAL FILED: October 12, 1988

DATE OF HEARING: October 31, 1988
November 1, 1988

APPEARANCES: Claimant/Employer
David Knowlton, Esq.

PLACE OF HEARING: Telephone

The Department's decision dated October 3, 1988, denied unemployment insurance benefits effective September 4, 1988, holding the claimant was discharged from his employment for just cause. Section 35-4-5(b)(1) of the Utah Employment Security Act is quoted on the attached sheet.

Jurisdiction for this review is established in accordance with Section 35-4-6(c) of the Utah Employment Security Act and the Rules pertaining thereto.

FINDINGS OF FACT:

The claimant worked as a boiler plant equipment mechanic for Hill Air Force Base from December 1, 1980 to August 16, 1988. He was terminated from his employment because of off-duty conduct which resulted in him being placed under arrest.

The claimant worked for the employer at the Utah Test and Training Range. The position required a security clearance. The employer had provided him with a limited access badge to the controlled area pending adjudication of his security clearance.

Sometime in February 1988, one of the claimant's co-workers approached the personnel department to discuss his employment status. He represented that he was a recovering drug user and finding it difficult to function in his current work assignment. He suggested that the claimant had invited him to use a controlled substance on the job. As a result of the conversation, the co-worker was transferred to a position at Hill Air Force Base. The matter was referred to the Air Force Office of Special Investigations. The latter part of February, 1988, the employer took away the claimant's limited access badge. He was required at that point to be escorted into controlled areas. The claimant's manager attempted to have him transferred to a new work station which would not require a security clearance.

On July 26, 1988, a criminal complaint was issued against the claimant for unlawful distribution, offering, agreeing, consenting or arranging to distribute a controlled substance. The complaint alleged that a party had purchased cocaine from the claimant on April 8, 1988. The claimant was arrested while at work on August 16, 1988, and charged with unlawful distribution of a controlled substance. He served one day in jail and was then released on bail. He reported back to work the following day. He was barred from re-entering the military installation pending an investigation of the incident.

A Notice of Proposed Removal Letter was presented to the claimant on August 21, 1988. He was advised the action was proposed for the offense of off-duty misconduct of such a major import that the employee was unable to fulfill his job responsibilities. The letter suggested the claimant had sold two grams of cocaine, a controlled substance, to a Utah State Narcotics Bureau special agent on April 8, 1988. A Report of Investigation was distributed to the employer on August 30, 1988, detailing the events that led to the claimant's arrest on August 16, 1988. A decision was issued by the employer on September 1, 1988, removing the claimant from his civil service position.

The claimant had received no previous warnings concerning his job performance. He was considered by the employer to be a satisfactory employee. The claimant appeared in court on September 19, 1988, and entered a guilty plea to a third-degree felony charge of attempting to unlawfully distribute a controlled substance. He is scheduled to be sentenced the first part of November, 1988.

REASONING AND CONCLUSION OF LAW:

The Unemployment Insurance Rules pertaining to Section 35-4-5(b)(1) provide in pertinent part:

> A. . . . Unemployment insurance benefits will be denied if the employer had just cause for discharging the employee. However, not every cause for discharge provides a basis to deny benefits. In order to have just cause for discharge pursuant to Section 35-4-5(b)(1), there must be some fault on the part of the employee involved.
>
> B. JUST CAUSE
>
> 1. The basic factors which establish just cause and are essential for a determination of ineligibility are:
>
> a. Culpability
>
> This is the seriousness of the conduct or the severity of the offense as it affects continuance of the employment relationship. The discharge must have been necessary to avoid actual or potential harm to the employer's rightful interests.

B.1.b Knowledge

The employee must have had a knowledge of the conduct which the employer expected. It is not necessary that the claimant intended to cause harm to the employer, but he should reasonably have been able to anticipate the effect his conduct would have.

B.1.c Control

The conduct must have been within the power and capacity of the claimant to control or prevent.

G. IN CONNECTION WITH EMPLOYMENT

Disqualifying conduct is not limited to offenses which take place on the employer's premises or during business hours. It is only necessary that the conduct have such "connection" to the employee's duties and to the employer's business that it is a subject of legitimate and significant concern to the employer. All employers, both public and private, have the right to expect employees to refrain from acts which are detrimental to the business or would bring dishonor on the business name or the institution. Legitimate interests of employers include, but are not limited to: Goodwill of customer, reputation of the business, efficiency, business costs, morale of employees, discipline, honesty, trust and loyalty.

The claimant, at the time of separation, was a suspect in a case involving the distribution of a controlled substance. Although he had been implicated in the sale, he had entered no plea on the charge nor had he provided any statements to the employer representing guilt on his part. The employer relied solely on the investigation report which alleged the claimant had been involved in the sale of a controlled substance. It is of special note that the offense occurred while the claimant was off duty. There was no special notoriety given to the incident other than the claimant being arrested while at work on August 16, 1988. The matter was not publicized and co-workers who may have observed the arrest could only speculate as to the cause of that action. The claimant emphatically denies using drugs on the job or participating in any activities which would have resulted in co-workers purchasing or using illegal substances. The employer's position that the discharge was prompted by the claimant's inability to obtain a security clearance is unpersuasive. The claimant had worked for the employer for over seven years without any special clearance, and the evidence does not sustain that this hampered his job performance in any way. The only supportable conclusion to be adduced from the evidence presented by the parties is that the claimant was discharged for his off-duty conduct which resulted in his being arrested on August 11, 1988. The employer failed to show the conduct had any direct connection to the employee's duties, or the employer's legitimate business interest. While the employer may have had the right to fire the claimant because of his off-duty activities, there is insufficient evidence to show his actions rise to the level of culpability so as to constitute disqualifying conduct under the terms of the statute. Under

these circumstances, the Administrative Law Judge concludes the claimant was not discharged from his employment for just cause.

DECISION:

The Department's decision denying to pay the claimant unemployment insurance benefits pursuant to the provisions of Section 35-4-5(b)(1) of the Utah Employment Security Act is reversed. The claimant is allowed unemployment insurance benefits effective September 4, 1988, provided he is otherwise eligible.

Norman Barnes
Administrative Law Judge
DEPARTMENT OF EMPLOYMENT SECURITY

This decision will become final unless, within ten days from November 2, 1988, further written appeal is made to the Board of Review (P.O. Box 11600, Salt Lake City, Utah 84147) setting forth the grounds upon which the appeal is made.

mj

Attachment

cc: Air Force Hill Air Force Base
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Civilian Personnel, D. Mabey
Hill AFB, Utah 84056

David Knowlton, Esq.

BOARD OF REVIEW
The Industrial Commission of Utah
Unemployment Compensation Appeals

TRC/NB/AH/cdm

WILLIAM R. COMER
S.S.A. No. 528-08-6111 :

: Case No. 88-A-4707

: DECISION

: Case No. 88-BR-435

DEPARTMENT OF EMPLOYMENT SECURITY :

The employer, U. S. Air Force-Hill Air Force Base, appeals the decision of the Administrative Law Judge in the above-entitled matter which held that William R. Comer had been discharged from his employment for reasons that are not disqualifying under §35-4-5(b)(1) of the Utah Employment Security Act. The ALJ's decision therefore allowed payment of unemployment benefits to the claimant effective September 4, 1988 and continuing, provided he is otherwise eligible.

After careful consideration of the record in this matter, the Board of Review finds the decision of the Administrative Law Judge to be a correct application of the provisions of the Utah Employment Security Act, supported by competent evidence, and therefore affirms the decision.

Comer was fired by the Air Force after he was arrested by civilian authorities and charged with distribution of illegal drugs. Comer later pled guilty to a reduced charge of attempted distribution of illegal drugs. The incident had occurred away from the Air Force base during off-duty hours and did not involve other Air Force employees.

Seven months prior to Comer's arrest, a co-worker advised the Base Commander that Comer had offered him illegal drugs while on duty. Comer was not told of the co-worker's allegations nor was any disciplinary action taken against him. At the hearing before the ALJ, the employer did not call the co-worker as a witness; Comer testified under oath that the co-worker's allegations were false.

In permitting payment of benefits, the Board does not minimize Comer's reprehensible conduct. However, benefits cannot be denied under §5(b)(1) unless it is shown that his misconduct was "in connection with employment" and that such misconduct constituted "just cause" for his discharge.

The Board recognizes that even off-duty conduct may be "in connection with employment" under some circumstances. As stated in Unemployment Insurance Rule R475-5b1-7:

> Disqualifying conduct is not limited to offenses which take place on the employer's premises or during business hours. It is only necessary that the conduct have such "connection" to the employee's duties and to the employer's business that it is a subject of legitimate and significant concern to the employer.

In this case, the employer has failed to establish any such connection between Comer's criminal conduct and his work duties or the employer's business. The employer might have demonstrated such a connection by proving Comer offered illegal drugs to other employees at work, as alleged by a co-worker. However, the co-worker's allegations were submitted in the form of a hearsay statement by another witness; the employer failed to obtain the direct testimony of the co-worker himself. For his part, Comer categorically denied, under oath, the co-worker's allegations. Given this state of the record, no competent evidence exists to support a finding of employment-related drug activity. The Board must therefore conclude that Comer's misconduct was not in connection with employment.

Even if the Board were to find that Comer's misconduct was connected to his employment, the employer must also establish that Comer's discharge was for just cause as that term is used in §5(b)(1). Just cause is established if each of the elements of culpability, knowledge and control exist. It is the element of culpability which is absent in this case.

Culpability is defined as the seriousness of the worker's conduct as it affects continuance of the employment relationship. The discharge must have been necessary to avoid actual or potential harm to the employer's rightful interests. (See Unemployment Insurance Rule R475-5b1-2.1.a) While the employer might conceivably be able to show Comer's conduct posed some potential for harm to its legitimate interests, mere speculation and conclusionary statements on the part of the employer are insufficient to establish culpability. The Board particularly notes the employer permitted Comer to continue his employment even after serious charges of drug related activity had been leveled against him. The employer's failure to act indicates it did not consider Comer's prior conduct to be culpable. The Board must therefore conclude Comer was not discharged for just cause within the meaning of §5(b)(1) of the Act.

This decision becomes final on the date it is mailed, and any further appeal must be made within 30 days from the date of mailing. Your appeal must be submitted in writing to the Utah Court of Appeals, Midtown Plaza, 230 South 500 East, Suite 400, Salt Lake City, Utah. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal,

pursuant to §63-46b-16 of the Utah Administrative Procedures Act and Rule 14 of the Rules of the Utah Court of Appeals, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Rules of the Utah Court of Appeals.

Dated this 17th day of January, 1989.

Date Mailed: January 25, 1989.

I hereby certify that I caused a true and correct copy of the foregoing DECISION to be served upon each of the following on this 25th day of January, 1989 by mailing the same, postage prepaid, United States mail to:

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BOARD OF REVIEW

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Presidential Documents

Title 3—

The President

Executive Order 12564 of September 15, 1986

Drug-Free Federal Workplace

I, RONALD REAGAN, President of the United States of America, find that:

Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year;

The Federal government, as an employer, is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity;

The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;

The profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society;

The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;

Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;

The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law; and

Federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves.

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 3301(2) of Title 5 of the United States Code, section 7301 of Title 5 of the United States Code, section 290ee–1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal workplace and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. *Drug-Free Workplace.*

(a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Sec. 2. *Agency Responsibilities.*

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Sec. 3. *Drug Testing Programs.*

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Sec. 4. *Drug Testing Procedures.*

(a) Sixty days prior to the implementation of a drug testing program pursuant to this Order, agencies shall notify employees that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through the agency's Employee Assistance Program. Agency drug testing programs already ongoing are exempted from the 60-day notice requirement. Agencies may take action under section 3(c) of this Order without reference to the 60-day notice period.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

(c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. Procedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided.

(d) The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Sec. 5. *Personnel Actions.*

(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.

(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, *provided that* such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counseling or rehabilitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.

(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:

(1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program; or

(2) Does not thereafter refrain from using illegal drugs.

(e) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(f) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

(g) Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(h) Drug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order.

Sec. 6. *Coordination of Agency Programs.*

(a) The Director of the Office of Personnel Management shall:

(1) Issue government-wide guidance to agencies on the implementation of the terms of this Order;

(2) Ensure that appropriate coverage for drug abuse is maintained for employees and their families under the Federal Employees Health Benefits Program;

(3) Develop a model Employee Assistance Program for Federal agencies and assist the agencies in putting programs in place;

(4) In consultation with the Secretary of Health and Human Services, develop and improve training programs for Federal supervisors and managers on illegal drug use; and

(5) In cooperation with the Secretary of Health and Human Services and heads of Executive agencies, mount an intensive drug awareness campaign throughout the Federal work force.

(b) The Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order.

(c) Nothing in this Order shall be deemed to limit the authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, or the statutory authorities of the National Security Agency or the Defense Intelligence Agency. Implementation of this Order within the Intelligence Community, as defined in Executive Order No. 12333, shall be subject to the approval of the head of the affected agency.

Sec. 7. *Definitions.*

(a) This Order applies to all agencies of the Executive Branch.

(b) For purposes of this Order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the armed forces as defined by 5 U.S.C. 2101(2)); or any other employing unit or authority of the Federal government, except the United States Postal Service, the Postal Rate Commission, and employing units or authorities in the Judicial and Legislative Branches.

(c) For purposes of this Order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(d) For purposes of this Order, the term "employee in a sensitive position" refers to:

(1) An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order No. 12356;

(3) Individuals serving under Presidential appointments;

(4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and

(5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

(e) For purposes of this Order, the term "employee" means all persons appointed in the Civil Service as described in 5 U.S.C. 2105 (but excluding persons appointed in the armed services as defined in 5 U.S.C. 2102(2)).

(f) For purposes of this Order, the term "Employee Assistance Program" means agency-based counseling programs that offer assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health programs that affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employees' progress while in treatment.

Sec. 8. *Effective Date.* This Order is effective immediately.

Ronald Reagan

THE WHITE HOUSE,
September 15, 1986.

[FR Doc. 86-21166
Filed 9-15-86; 3:47 pm]
Billing code 3195-01-M

Editorial note: For the President's remarks of September 15 on signing EO 12564, see the *Weekly Compilation of Presidential Documents* (vol. 22, no. 38).

R475-2. Purpose of Employment Security Act

R475-2-1. Preamble

1 One of the purposes of the Employment Security Act is to lighten the burdens of persons unemployed through no fault of their own by maintaining their purchasing power in the economy The legislature, in establishing this program, recognized the substantial social ills associated with unemployment and sought to ameliorate these problems with a program to pay workers for a limited time while they seek other employment It is because of these reasons that it is in the public interest to liberally construe and administer the Act It is important that both the worker seeking benefits and the employer who will ultimately pay for such benefits understand the process by which contributions are assessed and benefits are paid The following Rules are written to explain and clarify the application of the Act In applying these Rules to individual cases the Department will consider the reasonableness of claimant's action, the totality of the employment situation, and whether the claimant has a genuine continuing attachment to the labor market

2 The Utah Department of Employment Security has an obligation to be unbiased in administration of the Act Therefore, the Department must allow all parties due process before dispensing the revenues provided by the Employment Security Act in order to protect the investment of employers who contributed to the unemployment insurance fund, the interests of the unemployed workers who may be eligible for the dollars provided by the fund, and the community which benefits from a stable workforce through the maintenance of purchasing power Due process requires that employers will not be charged contributions for benefits, and workers will not be denied benefits, without the opportunity to provide information and contest or refute the information considered in the decision making process

3 When an eligible worker has no work available there exists no controversy between the worker, the employer, or the Department and benefits must be paid promptly if all the provisions of Act are met. However, when a worker quits, is fired, or has any other issue under the law an investigation of the circumstances must take place to determine if benefits can be paid In determining whether or not the worker is eligible for benefits, his actions are measured against the standards of just cause following a discharge, and good cause and equity and good conscience following a voluntary separation from employment When one party fails to provide information or when that information is less credible, the result is that the party who has the responsibility to provide information may not prevail in its position.

R475-2-2. Evidentiary Requirements

The evidentiary requirement for Department decisions is a preponderance of the evidence It is not necessary to meet criminal court standards of beyond reasonable doubt or overwhelming evidence Preponderance means evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it, that is, evidence which as a whole shows that the fact sought to be proved is more probable than not Although the evidence that is required for an appeal decision must be of probative value, an initial determination must be made based on the best or most logical information available Sworn testimony or first-hand statements have greater believability than unsworn statements or hearsay A great deal of information is provided to the Department through telephone conversations and written reports. While the information provided in this manner will always be considered by the Department, it cannot be relied upon more than credible sworn testimony when the parties have been given an opportunity to present evidence in person

Hearsay, which is information provided by a source whose credibility cannot be tested through cross-examination, has inherent infirmities which make it unreliable The failure of one party to provide information either initially or at the appeals hearing severely limits the amount and quality of information upon which to base a good decision Therefore, it is necessary for all parties to actively participate in the decision making process by providing accurate and complete information in a timely manner to assure the protection of the interests of each party and preserve the social integrity of the unemployment insurance system

1987 35-4-2

R475-3a. Bi-Weekly Payment of Benefits

R475-3a-1. General Definition

Eligibility for benefits is established with regard to a calendar week Benefits shall be paid on a bi-weekly basis Therefore, benefits will not become due until the end of a two-week period for which benefits are claimed in accordance with regulations governing the filing of claims

1987 35-4-3a

R475-3b. Weekly Benefit Amount

R475-3b-1. General Definition

This section of the Act outlines the procedure for determining the Weekly Benefit Amount (WBA) and the Maximum Benefit Amount (MBA) which an eligible claimant can receive and recomputations based on retirement income. Claimants are instructed when filing the initial claim to report all base period employers. Employers are required by law to report to the Department the wages paid to all employees

at the time he files the first claim to be monetarily eligible for a second claim after the first benefit year ends. However, before benefits can be allowed on the second claim, the claimant who has received compensation during the first benefit year is required to have had work since the beginning of such year in order to qualify for compensation in his next benefit year.

R475-4g-2. Successive Benefit Year

A successive benefit year is not limited to a claim that begins the week following the last week of the original benefit year (transitional claim), but may affect any claimant who files a second claim.

R475-4g-3. Subsequent Employment

The elements of subsequent employment necessary to meet the requirements of this provision of the Act are:

1. Insured Work

The earnings must be in "covered employment" subject to a State or Federal unemployment insurance program (including railroad employment) which can be used to establish monetary eligibility for unemployment insurance benefits.

2. The work must have been performed after the effective date of the original claim, but not necessarily during the benefit year of the original claim.

3. Actual services must have been performed, not just the establishment of covered wages attributable to a period of time subsequent to the effective date of the original claim such as vacation or severance pay.

4. The covered earnings must be equal to at least six times the weekly benefit amount of the original or subsequent claim, whichever is lower.

R475-4g-4. Period of Disqualification

If the claimant meets the requirements of monetary eligibility under Section 35-4-4(f), he may establish a claim but benefits would be denied under this section from the effective date of the claim until the week in which the claimant provides proof of earnings from subsequent employment as required to remove the disqualification.

a. Exception to Disqualification

The provisions of this section do not apply unless the claimant actually received compensation during the original benefit year. If the claimant never filed for a compensable week; was disqualified and no benefit checks were issued; or the original claim could be canceled under the Rules pertaining to Section 35-4-4(a), a disqualification under this section would not be assessed.

1987 35-4-4g

R475-5a. Voluntary Leaving

R475-5a-1. General Information

Voluntarily leaving work means that the employee severed the employment relationship as contrasted to a separation initiated by the employer. This is true regardless of how compelling the claimant's reasons were for making the decision to leave the work. Voluntary leaving will include not only leaving existing work, but also the failure to return to work after a lay-off, suspension, or period of absence. Voluntary leaving also includes failure to renew a contract as in the case of a school teacher or athlete. The Act requires two standards of consideration following a voluntary separation from employment: good cause and equity and good conscience. If the claimant fails to establish good cause for leaving work, unemployment insurance benefits will not be denied if a denial of benefits would be contrary to the equity and good conscience standard. It is necessary to assess the totality of the employment situation. Where there are mitigating circumstances it may not be equitable to deny benefits.

R475-5a-2. Good Cause

1. Good cause is established if continuance of the employment would have had an adverse effect on the claimant which could not be controlled or prevented and necessitated immediate severance of the employment relationship, or if the work was illegal, or unsuitable new work.

a. Adverse Effect on the Claimant

The separation must have been motivated by circumstances which made continuance of the employment a hardship or matter of real concern sufficiently adverse to a reasonable person to outweigh the benefits of remaining employed. There must be a showing of actual or potential physical, mental, economic, personal or professional harm caused or aggravated by continuance in the employment. The claimant's reason(s) for belief of the consequences of remaining on the job must be real, not imaginary; substantial, not trifling. These circumstances must be applied as to the average individual, not the supersensitive.

b. Ability to Control or Prevent

Even though there is evidence of an adverse effect on the claimant, good cause is not established if the claimant:

(1) reasonably could have continued working while looking for other employment, or

(2) had reasonable alternatives that would have made it possible for him to preserve his job through approved leave, transfer, or adjustment to personal circumstances, etc. or,

(3) had not given the employer notice of the circumstances causing the hardship so the employer would have an opportunity to make adjustment which would alleviate the need to quit. An employee with grievances about his employment must show an effort to work out the problems with the employer unless such efforts would be futile.

c. Illegal

Good cause is established if the individual was required to violate State or Federal law or his legal rights were violated; provided the employer was aware of the violation and refused to comply with the law.

d. Unsuitable New Work

Good cause may also be established if a claimant left new work which after a short trial period is shown to be materially unsuitable for the claimant consistent with the requirements of the suitable work test in Section 35-4-5(c)(1) and (2) of the Act. The fact that a job was accepted does not, in and of itself, make the job suitable. The longer a job is held, the more it tends to set the standard by which the suitability of the job is to be judged. After a reasonable period of time a contention that the quit

was motivated by unsuitability of the job is no longer persuasive.

R475-5a-3. Equity and Good Conscience

When the circumstances of the quit were not sufficiently compelling to justify an allowance of benefits for good cause, but there were mitigating circumstances, and a denial of benefits would be unreasonably harsh or an afront to fairness, benefits may be allowed under the provisions of equity and good conscience if all of the following elements are present:

a. the decision is made in cooperation with the employer by giving the employer an opportunity to provide information;

b. the claimant acted reasonably;

c. a denial would be inconsistent with the intent of the unemployment insurance program; and

d. the claimant demonstrated a continued attachment to the labor market.

2. The elements of equity and good conscience are defined as follows:

a. In Cooperation with the Employer

In administering the unemployment insurance program, the intent of the Department is to maintain a careful balance between claimants and employers and to make fairness the uppermost consideration. The employer is given an opportunity to provide information when the Department notifies him that a former employee has filed a claim for benefits. Such notice provides an opportunity to explain the reason for separation. The employer is also notified of any appeal with regard to the separation except as provided under Section 35-4-4(e).

b. The Claimant Acted Reasonably

Reasonable is defined as those actions which make the decision to quit logical, sensible or practical. The actions which might be acceptable for a member of a subculture are not the norm by which reasonableness is established. There must be mitigating circumstances which, although not compelling, may be considered as motivating a reasonable person to take similar action.

c. Consistent with the Purposes of the Act

The intent of the Act is to temper the hardships associated with unemployment and to provide stability for the economy by maintaining purchasing power, individual skills and a stable workforce.

d. Continued Attachment to the Labor Market.

The claimant establishes his continued attachment to the labor market by taking positive action(s) which could result in employment during the first week after leaving work and each week thereafter. Attachment to the labor market is demonstrated by such actions as making contacts with prospective employers, preparing resumes, developing job leads, etc. Such a work search should have been undertaken without instructions from the Department. Failure to show attachment to the labor market during the first week of unemployment may be allowed if it was not practical for the individual to seek work in circumstances such as: illness, hospitalization, incarceration, or for other reasons beyond the control of the claimant provided a worksearch was commenced as soon as practical.

R475-5a-4. Quit to Accompany, Follow or Join a Spouse

1. An individual leaves work without good cause, regardless of the reason for the move, if he or she quit to move with, follow or join, a lawful wife or husband, to or in a new place of residence from which it is not practical to commute to the employment. Even if such necessitous circumstances as the expense of maintaining two separate households, or the need to keep a family together, were factors in the decision to move, benefits cannot be allowed. The Utah Legislature has chosen not to insure this aspect of domestic life. The only exception to this provision is where a claimant quits to accompany a spouse who is compelled to move to a new locale for medical reasons which are beyond the control of the spouse.

R475-5a-5. Evidence and Burden of Proof

Since the claimant is the moving party in a voluntary separation, he is the best source of information with regard to the reasons for the quit. The claimant has the burden of proof and must show that he had "good cause" for quitting, or that he meets the requirements for allowance under the equity and good conscience provision before benefits can be allowed.

R475-5a-6. Quit or Discharge

1. Refusal to Follow Instructions Constructive Abandonment

If the claimant knew his job would be forfeit upon failure to follow reasonable requests or instructions, but chose not to comply, the resultant separation was a quit, not a discharge.

2. Leaving Prior to Effective Date of Termination

a. When a worker leaves prior to the date of an impending reduction in force, he will be considered to have quit. A worker has an obligation to remain on the job until the work is completed. Notice of an impending layoff is not good cause to leave in order to get a head start in searching for other work. However, the duration of available work may be a mitigating factor in determining good cause of equity and good conscience, depending upon the reason for the decision to quit. If it is determined that the claimant is not disqualified under Section 35-4-5(a), benefits shall be denied under Section 35-4-4(c) for the limited period of time the claimant had been told by the employer that he could have continued working, as he failed to accept all available, suitable work for such weeks.

b. An individual cannot escape a disqualification under Section 35-4-5(b)(1) by quitting in advance of a virtually certain discharge which would result in a denial of benefits. Such a separation shall be treated as a discharge.

3. Leaving Work Because of a Disciplinary Action

If the disciplinary action or suspension is reasonable and non-discriminatory, leaving work rather than submit to such actions, or failing to return to work at the end of the suspension, is considered to be a voluntary quit without good cause unless the claimant was previously disqualified under the provisions of Section 35-4-5(b)(1).

4. Failure to Return at the End of a Leave of Absence

When a claimant takes a leave of absence for any reason and files a claim while still on leave from his employer, he will be considered "unemployed" even though he still has an attachment to the employer. However, his reason for taking the leave of absence will determine if he had good cause for quitting. If the claimant fails to return to work at the end of the leave of absence, this is also considered a voluntary quit which must result in a denial of benefits if the claimant cannot show good cause or that a denial would be contrary to equity and good conscience.

5. Leaving Due to a Remark or Action of the Employer or a Co-Worker

When a worker interprets remarks of co-workers

or supervisors to mean he is to be discharged, the claimant has the responsibility to assure himself, prior to leaving that the employer intended to terminate the employment relationship and to continue working until the date of the discharge If he fails to do so, or was not to be discharged, he left work voluntarily

6 Resignation Intended

a. When a worker submits his resignation to be effective at some definite future date, but is discharged prior to that date, the leaving is involuntary because the immediate cause of the separation is the result of the employer's action However, the worker who states that he is quitting, but agrees to continue working for an indefinite period of time and will leave at the convenience of the employer, leaves voluntarily even though the date of separation is determined by the employer

b When a worker resigns and later changes his mind and attempts to remain employed, the reasonableness of the employer's refusal to continue the employment is the determining factor in deciding if the claimant quit or was discharged For example if the employer had already hired a replacement, or taken other action because of the claimant's impending quit, it may not be practical for the employer to allow the claimant to withdraw his resignation and it would be held that the separation was voluntary

R475-5a-7 Examples of Specific Reasons for Separations

In all the following examples, the basic elements of good cause or equity and good conscience must be considered in determining eligibility for benefits The following examples do not include all reasons for leaving employment

1 Prospects of Other Work

Good cause is established if at the time of separation the claimant had a definite and immediate assurance of another job or self-employment that was reasonably expected to be full-time and permanent Occasionally, after giving notice, but prior to leaving the first job, the individual learns that the new job will not be available when promised, permanent, full-time, or otherwise suitable Good cause is established in such circumstances if the claimant immediately attempted, unless such an attempt was obviously futile, to rescind his notice of impending quit and continue working with his current employer However, if it is apparent the claimant knew, or should have known, about the unsuitability of the new work, but quits the first job and subsequently also leaves the new job, a disqualification will apply from the time the claimant quit the first job

a. A definite assurance of another job means that the claimant has personally been in contact with someone in authority to hire, been given a definite date to begin working and told under what conditions he will be hired. If he has been told of a possibility of a job opening and to report at the job site this circumstance implies only that he will be considered for hire, not a definite assurance of hire Mere rumors of job openings are not job offers Prospects of other work developed after leaving are relevant only in showing a genuine attachent to the labor force.

b. An immediate assurance of another job means that the prospective job will begin within two weeks, barring necessitous circumstances, of the last day of work on the job he is leaving. Benefits would be denied under the provisions of Section 35-4-4(c) if the claimant files during the interim between the two jobs If the job is to begin at a future date which is tentative and dependent on circumstances which cannot be definitely predicted the claimant does not have good cause for leaving work

2 Part time Work and Reduction of Hours

a The reduction of an employee's working hours alone is not good cause for leaving the job A reasonable person will remain partially employed as opposed to severing the relationship with the employer *If the claimant is earning less than his weekly* benefit amount, he could receive a partial unemployment insurance check even though he has not been separated from the employer In extreme cases, however, a reduction of hours may be so detrimental to the employee that the circumstances justify leaving All of the following elements are necessary to establish good cause for quitting without first obtaining other employment

(1) The reduction involves a substantial number of hours in proportion to the number of hours normally worked

(2) The reduction is permanent or expected to be of a long duration

(3) The reduction in hours causes a serious financial burden, or adverse effect on personal circumstances such as transportation, childcare, etc , resulting in a real hardship and the claimant could not make reasonable adjustments to his personal circumstances prior to quitting

(4) The claimant was not advised at the time he was hired that a reduction of hours was possible or pending or the reduction in the hours was not a customary and known condition of the job as in the case of school employees or seasonal workers

(5) The reduction was not at the request of the claimant, was beyond the claimant's control, and the claimant attempted in good faith to avoid the reduction in hours (except where such an attempt was clearly futile) by discussing the circumstances with the employer and accepting all work which was reasonably available

b If any of the foregoing five elements are not present and good cause cannot be shown, the provisions of equity and good conscience may apply where there are mitigating circumstances or the reduction in hours was substantially unfair to the claimant Mitigating circumstances include such things as (1) prospects of full-time work exist, but cannot be pursued while continuing to work part-time, (2) the employer failed to comply with prior representations he made to the claimant, (3) the claimant made prior concessions for the benefit of the employer such as specialized training, relocation, etc , (4) the reduction in hours was not equitably distributed or based on a rational basis, such as seniority or job requirements

3 Personal Circumstances

There may be personal circumstances which are sufficiently compelling or create sufficient hardship to justify leaving work, provided the individual made reasonable attempts to make adjustments or find alternatives

4 Leaving to Attend School

Leaving work to attend school might be justified on general principles but is not good cause for becoming unemployed within the meaning of the Act.

5. Conscientious Objection

For religious concerns to establish good cause for quitting there must be evidence that the effects of continuing work would conflict with good faith, honestly held religious convictions. This does not necessarily mean that any personal belief, no matter how unique, is entitled to this protection However,

beliefs need not be acceptable, logical, consistent, or comprehensible to others or shared by all members of a religious sect in order to be good faith religious convictions. Where the individual was not called upon, as a condition of his employment, to violate his religious beliefs, he is not compelled to quit. A general abhorrence of war does not show a compelling need to quit work at an armory nor does membership in a religion which counsels against the use of alcohol preclude employment in a grocery store or restaurant where alcoholic beverages are sold. A decision not to continue working under conditions which conflict with convictions does not justify leaving work unless there is evidence of a good faith change in personal convictions as shown by a change in lifestyle. However, a change in the job requiring work in conflict with personal or religious convictions is good cause for leaving if the claimant has not previously worked under such conditions and the employer will not make adjustments.

6. Distance

An employee has the responsibility to arrange transportation to and from work within normal commuting patterns, unless it is customary in that job or occupation for the employer to provide transportation. When lack of transportation, beyond the control of the individual, prevents continuance of the work, good cause may be established provided the claimant has no other alternate means of transportation. An individual's preference for a discontinued mode of transportation to a substantially equal one is not good cause. The mere inconvenience of one kind of transportation as compared with another should not be confused with hardship. When a change in residence results in an increased distance to work beyond normal commuting patterns, the reason for the move, not the distance to the work, is the factor which determines if the claimant quit with good cause.

7. Marriage

a. When an individual leaves work to be married, such a personal choice is not good cause for quitting, even if the intended residence of the couple was too far for the claimant to commute to the work.

b. When the employer has a rule that requires separation of an employee who marries a co-worker, the separation is involuntary even though the employer may leave it to the couple to decide who will leave.

8. Health or Physical Condition

a. A worker generally consults a physician prior to quitting to determine if the job was actually a factor contributing to the health problem. Although it is not essential for the claimant to have been advised by a physician to quit, a contention that health problems required the separation must be established by competent evidence. Even if the work causes or aggravates a health problem, if there are alternatives, such as treatment or medication, or the conditions of the work can be changed to alleviate the problem, good cause for quitting is not established.

b. Leaving work because of an employer's failure to comply with government regulations concerning health and safety is good cause provided the employer was told of the problem and did not take corrective action. The degree of risk to health and safety must be substantial before leaving could be considered good cause.

c. Some conditions of work, although meeting government safety and health standards, may present an undue risk to a particular worker because of unique personal conditions. Allergy is one example of unique circumstances that might require a job change or adjustment. However, if the risk to health or safety is one borne by all those employed in the occupation and the claimant fails to show he was affected to a greater extent than the other workers in the same occupation, good cause for leaving is not established. A fear of potential health and safety problems is not good cause for quitting unless the claimant can show that the fear is justified.

d. Pregnancy is treated as any other temporary disability. Employers generally provide maternity leave if leave is provided for other medical disabilities. If leave is available, the claimant voluntarily quits by failing to accept or arrange leave or failing to return at the end of the leave.

9. Retirement and Pension

Leaving work solely to accept retirement benefits is not a compelling reason for quitting. Although it may be reasonable for an individual to take advantage of a retirement benefit, payment of unemployment benefits in such a circumstance would not be consistent with the intent of the Unemployment Insurance program, and, therefore, a denial of benefits would not be contrary to equity and good conscience. However, if the employer required the employee to leave work at a certain age, or after an established number of years, the separation was involuntary.

10. Sexual Harassment

a. A claimant may have good cause for leaving if the quit was due to discriminatory and unlawful sexual harassment, provided the employer was given a chance to take necessary action to alleviate the objectionable conduct. Sexual harassment is a form of sex discrimination which is prohibited by Title VII of the U. S. Civil Rights Act. Sexual harassment is intimidation by a person of either sex against a person of the opposite or same sex. For sexual harassment to be discriminatory, the following three elements must be shown to exist:

(1) Unwanted conduct or communication of a sexual nature which adversely affects a person's employment relationship or working environment, if:

(a) submission to the conduct is either an explicit or implicit term or condition of employment, or

(b) submission to or rejection of the conduct is used as a basis for an employment decision affecting the person, or

(c) the conduct has a purpose or effect of substantially interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment,

(2) Unsolicited, deliberately sexual statements, gestures or physical contacts which are objectionable to the recipient,

(3) Undermines the integrity of the workplace, destroys morale and offends legal and social standards of acceptable behavior.

b. Inappropriate behavior which has sexual connotation but does not meet the test of sexual discrimination is insufficient to establish good cause for leaving work.

11. Discrimination

It is also a violation of Federal law to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee because of the individual's race, color, religion,

sex or national origin.

R475-5a-8. Effective Date of Disqualification

1. The disqualification under this section technically begins with the week the claimant voluntarily quit the job. However, to avoid the confusion which arises when a disqualification is made for a period of time prior to the filing of a claim, the claimant will be notified that benefits are denied beginning with the effective date of a new or reopened claim. The disqualification continues until the claimant returns to work in a bona fide covered employment and earns six times his weekly benefit amount after the week in which the claimant left work. A disqualification which begins in one benefit year will continue into a new benefit year unless purged by subsequent earnings.

2. If an individual is receiving remuneration which is attributed to a period of time following the last day of work, such as severance or vacation pay, the "week in which the claimant left work" is considered to be the last week for which such remuneration was attributable as an individual is not "unemployed" while receiving remuneration from an employer, and such severance or vacation pay cannot be used to purge a disqualification.

1987 35-4-5a

R475-5b. Discharge and Discharge for Crime

R475-5b-1. Discharge
R475-5b-2. Discharge for Crime

R475-5b-1. Discharge

I. General Definition

Ordinarily accepted concepts of justice are used in determining if a discharge is disqualifying under the "just cause" provisions of the Act. Just cause is defined as a job separation that is necessary due to the seriousness of actual or potential harm to the employer provided the claimant had knowledge of the employer's expectations and had control over the circumstances which led to the discharge. Just cause is not established if the reason for the discharge is baseless, arbitrary or capricious or the employer has failed to uniformly apply reasonable standards to all employees when instituting disciplinary action. The purpose of this section is to deny benefits to individuals who bring about their own unemployment by conducting themselves, with respect to their employment with callousness, misbehavior, or lack of consideration to such a degree that the employer was justified in discharging the employee. However, when an employee is discharged by his employer, such discharge may have been the result of incompetence, lack of skill, or other reasons which are beyond the claimant's control. The question which must be established by the evidence is whether the claimant is at fault in his resulting unemployment. Unemployment insurance benefits will be denied if the employer had just cause for discharging the employee. However, not every cause for discharge provides a basis to deny benefits. In order to have just cause for discharge pursuant to Section 35-4-5(b)(1) there must be some fault on the part of the employee involved.

II. Just Cause

1. The basic factors which establish just cause, and are essential for a determination of ineligibility are:

a. Culpability

This is the seriousness of the conduct or the severity of the offense as it affects continuance of the employment relationship. The discharge must have been necessary to avoid actual or potential harm to the employer's rightful interests. A discharge would not be considered "necessary" if it is not consistent with reasonable employment practices. The wrongness of the conduct must be considered in the context of the particular employment and how it affects the employer's rights. If the conduct was an isolated incident of poor judgment and there is no expectation that the conduct will be continued or repeated, potential harm may not be shown and therefore it is not necessary to discharge the employee.

(1) Longevity and prior work record are important in determining if the act or omission is an isolated incident or a good faith error in judgment. An employee who has historically complied with work rules does not demonstrate by a single violation, even though harmful, that such violations will be repeated and therefore require discharge to avoid future harm to the employer. For example: A long term employee who does not have a history of tardiness or absenteeism is absent without leave for a number of days due to a death in his immediate family. Although this is a violation of the employer's rules and may establish just cause for discharging a new employee, the fact that the employee has established over a long period of time that he complies with attendance rules shows that the circumstance is more of an isolated incident rather than a violation of the rules that is or could be expected to be habitual. In this case because the potential for harm to the employer is not shown, it is not necessary for the employer to discharge the employee, and therefore just cause is not established.

b. Knowledge

The employee must have had a knowledge of the conduct which the employer expected. It is not necessary that the claimant intended to cause harm to the employer, but he should reasonably have been able to anticipate the effect his conduct would have. Knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a pertinent written policy, except in the case of a flagrant violation of a universal standard of behavior. If the employer's expectations are unclear, ambiguous or inconsistent, the existence of knowledge is not shown. A specific warning is one way of showing that the employee had knowledge of the expected conduct. After the employee is given a warning he should be given an opportunity to correct objectionable conduct. Additional violations occurring after the warning would be necessary to establish just cause for a discharge.

(1) For Example: When the employer has an established procedure of progressive discipline, such procedures generally must have been followed in order to establish that the employee had knowledge of the expected behavior or the seriousness of the act. The exception is that very severe conduct, such as criminal actions, may justify immediate discharge without following a progressive disciplinary program.

c. Control

The conduct must have been within the power and capacity of the claimant to control or prevent.

2. Just cause may not be established when the reason for discharge is based on such things as mere mistakes, inefficiency, failure of performance as the result of inability or incapacity, inadvertence in isolated instances, good faith errors in judgment or in the exercise of discretion, minor but casual or unintentional carelessness or negligence, etc. These examples of conduct are not disqualifying because of the lack of knowledge or control. However, continued

inefficiency, repeated carelessness, or lack of care exercised by ordinary, reasonable workers in similar circumstances, may be disqualifying depending on the reason and degree of the carelessness, the knowledge and control of the employee.

3. The term "just cause" as used in Section 5(b)(1) does not lessen the requirement that there be some fault on the part of the employee involved. Prior to the 1983 addition of the term "just cause" the Commission interpreted Section 5(b)(1) to require an intentional infliction of harm or intentional disregard of the employer's interests. The intent of the Legislature in adding the words "just cause" to Section 5(b)(1) was apparently to correct this restrictive interpretation. While some fault must be present, it is sufficient that the acts were intended, the consequences were reasonably foreseeable, and that such acts have serious effect on the employee's job or the employer's interests.

III. Burden of Proof

1 In a discharge, the employer initiates the separation and, as such, is the primary source of information with regard to the reasons for the dismissal The employer has the burden of proof which is the responsibility to establish the facts resulting in the discharge. The employer is required by the Statute in Section 35-4-11(g) to keep accurate records and to provide correct information to the Department for proper administration of the Act. Although the employer has the burden to establish just cause for the discharge, if sufficient facts are obtained from the claimant, a decision will be made based on the information available The failure of one party to provide information does not necessarily result in a ruling favorable to the other party

2. All interested parties have the right to give rebuttal to information contrary to the interests of that party

IV. Quit or Discharge

The determination of whether a separation is a quit or a discharge is made by the Department based on the circumstances which resulted in the separation. The conclusions on the employer's records, the separation notice or the claimant's report are not controlling on the Department.

1. Discharge Before Effective Date of Resignation

When an individual notifies an employer that he intends to leave as of a definite date in the future and is discharged prior to that date, the cause for the separation on the day the separation takes place is the controlling factor in determining whether it was a quit or discharge. Although the separation might have been motivated by the claimant's announced resignation, the employer was the moving party in ending the employment prior to the resignation date. Therefore, the immediate reason was more closely related to the employer's action than to the claimant's announced intention to quit. Unless disqualifying conduct is involved, the separation is considered to be for the convenience of the employer. However, if the employee is merely relieved of work responsibilities but is paid through the date of his announced resignation it is not a discharge but a quit.

2. Leaving in Anticipation of Discharge

When an employee leaves work in anticipation of a possible discharge or layoff, and if the reason for the discharge would not be disqualifying, the separation is generally considered to be a voluntary quit. However, an individual who leaves work to avoid virtually certain discharge for disqualifying conduct cannot thereby avoid the disqualifying provisions of Section 35-4-5(b), and the separation is considered a discharge rather than voluntary leaving

3 Employee Knows His Action will Result in Discharge

Absence taken without permission, or other actions contrary to specific reasonable instructions from the employer, are generally considered a voluntary separation rather than discharge, if the worker was given a choice of complying or being separated

V Disciplinary Suspension or Involuntary Furlough

When an employee is put on a disciplinary suspension or involuntary furlough, he may meet the definition of "unemployed" If the claimant files during the suspension or furlough, the reason for the suspension or furlough must be adjudicated as a discharge, even though the claimant is still attached to the employer and expects to return to work. A suspension which was reasonable and necessary to prevent potential harm to the employer or to maintain necessary discipline would generally result in a disqualification under this section provided the elements of control and knowledge are present Failure to return to work at the the end of the definite period of suspension or furlough would be considered a voluntary quit and eligibility would then be determined consistent with Section 35-4-5(a), if the claimant had not been previously denied

VI Proximal Cause Relation of Offenses to Discharge

1. The cause for discharge is that conduct which motivates the employer to make the decision to terminate the employee's services If the decision has truly been made, it is generally demonstrated by way of notice to the employee or the initiation of a personnel action. Although the employer may learn of other offenses following the making of the decision to terminate, the reason for the discharge is limited to that conduct of which the employer was aware prior to making the decision. However, if the employer discharges a person because of some preliminary evidence of certain conduct, but does not obtain all of the proof of the conduct until after the separation notice is given, it could still be concluded that the discharge was caused by that conduct which the employer was investigating. Eligibility for benefits will then be determined by considering the extent of culpability, knowledge and control.

2. When the discharge does not occur immediately after the employer becomes aware of an offense, a presumption arises that there were other reasons for the discharge. This relationship between the offense and the discharge must be established both as to cause and time. The presumption that the conduct was not the cause of the discharge may be overcome by a showing that the delay was due to such things as investigation, arbitration, or hearings conducted with regard to the employee's conduct. When a grievance or arbitration is pending with respect to the discharge, the Department's decision will be based on the information available to the Department. The Department's decision is not binding on the grievance resolution process or an arbitrator and the decision of the arbitrator is not binding On the Department. When an employer is faced with the necessity of a reduction in his workforce but uses an employee's prior conduct as the criteria for determining who will be laid off, the lack of work is the primary motivation or cause of the discharge, not the conduct.

VII. In Connection with Employment

Disqualifying conduct is not limited to offenses which take place on the employer's premises or

during business hours. It is only necessary that the conduct have such "connection" to the employee's duties and to the employer's business that it is a subject of legitimate and significant concern to the employer. All employers, both public and private have the right to expect employees to refrain from acts which are detrimental to the business or would bring dishonor on the business name or the institution. Legitimate interests of employers include, but are not limited to: goodwill of customers, reputation of the business, efficiency, business costs, morale of employees, discipline, honesty, trust and loyalty.

VIII. Examples of Reasons for Discharge

In all the following examples, the basic elements of just cause must be considered in determining eligibility for benefits. The following examples do not include all reasons for discharge.

1. Violation of Company Rules

If an employee violates reasonable rules of the employer and the three elements of culpability, knowledge and control are established, benefits must be denied.

a. The reasonableness of the employer's rules will depend on the necessity for such a rule as it affects the employer's interests. Rules which are contrary to general public policy or which infringe upon the recognized rights and privileges of individuals may not be reasonable. An employer must have broader prerogatives in regulating conduct when employees are on the job than when they are not. An employer must be able to make rules for employee on-the-job conduct that reasonably further the legitimate business interests of the employer. An employer is not required to impose only minimum standards, but there may be some justifiable cause for violations of rules that are unreasonable or unduly harsh, rigorous or exacting. When rules are changed, adequate notice and reasonable opportunity to comply must be afforded. If the employee believes a rule is unreasonable, he has the responsibility to discuss his concerns with the employer and give the employer an opportunity to take corrective action.

b. Discharges may be regulated by an employment contract or collective bargaining agreement. Just cause for the discharge is not established if the employee's conduct was consistent with his rights under such contract or the discharge was contrary to the provisions of such contract.

c. Habitual offenses may not be disqualifying conduct if it is found that the act was condoned by the employer or was so prevalent as to be customary. However, when the worker is given notice that the conduct will no longer be tolerated, further violations could result in a denial of benefits.

d. Culpability may be established even if the result of the violation of the rule does not in and of itself cause harm to the employer, but the resultant lack of compliance with rules diminishes the employer's ability to have order and control. Culpability is established if termination of the employee was required to maintain necessary discipline in the company.

e. Knowledge of the employer's standards of behavior is usually provided in the form of verbal instructions, written rules and/or warnings. However, the warning is not always necessary for a disqualification to apply in cases of violations of a serious nature of universal standards of conduct of which the claimant should have been aware without being warned.

2. Attendance Violations

a. It is the duty of the worker to be punctual and remain at work within the reasonable requirements of the employer. Discharge for unjustified absence or tardiness is considered disqualifying if the worker knows that he is violating attendance rules. Such violations are generally a serious matter of concern to employers as attendance standards are necessary to maintain order, control, and productivity. Discharge for an attendance violation beyond the control of the worker is not disqualifying unless the worker reasonably could have given notice or obtained permission consistent with the employer's rules.

b. In cases of termination for violations of attendance standards, the employee's recent history of attendance shall be considered to determine if the violation is an isolated incident, or demonstrates a pattern of unjustified absences within the control of the employee. Flagrant misuse of attendance privileges may result in a denial of benefits even if the last incident was beyond the employee's control.

3. Falsification of Work Record

a. The duty of honesty is inherent in any employee/employer relationship. A statement made in an application for a job may be considered as connected with the work, even though it is made before the work begins. An individual begins his obligations as an employee when he makes an application for work. One of those obligations is to give the employer truthful answers to all material questions. Any falsification of information which may operate to expose the employer to possible loss, litigation, or damage would be considered material and therefore may establish culpability. If the claimant made a false statement while applying for work in order to be hired, benefits may be denied even if the claimant would have otherwise remained unemployed and eligible for the receipt of unemployment benefits depending upon the degree of knowledge, culpability and control.

4. Insubordination

Authority is required in the work place to maintain order and efficiency. An employer has the right to expect that lines of authority will be maintained; that reasonable orders, given in a civil manner, will be obeyed; that supervisors will be respected and that their authority will not be undermined. In determining when insubordination (resistance to authority) becomes disqualifying conduct, the fact that there was a disregard of the employer's interests is the major importance. Mere protests or dissatisfaction without an overt act is not in disregard of the employer's interests. However, provocative remarks to a superior or vulgar or profane language in response to a civil request may be insubordination if it is conducive to disruption of routine, negation of authority and impairment of efficiency. Mere incompatibility or emphatic insistence or discussion by an employee who was acting in good faith is not disqualifying conduct.

5. Loss of License

When an employee loses a license which he knows is required for the performance of the job, and the individual had control over the circumstances which resulted in the loss of the license, such conduct is disqualifying. For example, if the claimant worked as a driver, and lost his license because of a conviction for driving under the influence (DUI), culpability is established if he fails to obtain a permit to drive at work or the conviction would expose the employer to additional liabilities. The employer cannot authorize an employee to drive in violation of the law. Also, additional insurance costs or other liabilities are a legitimate concern of the employer. Knowledge is established because it is a matter of common know-

ledge in the State of Utah that driving under the influence of alcohol is a violation of the law and is punishable by loss of the individual's driving privileges. Judicial notice can be taken of this fact because a question relative to this matter is on every driver's license test. He had control in that he made a conscious decision to risk loss of the license when he failed to make arrangements for transportation prior to becoming under the influence of intoxicants.

IX. Effective Date of Disqualification

The Act provides that any disqualification under this section will include "the week in which the claimant was discharged . . ." However, to avoid confusion, the denial of benefits will begin with the Sunday of the week for which claimant has filed for benefits.

R475-5b-2. Discharge for Crime

I. General Definition

1. A crime is a punishable act in violation of law; an offense against the State or the United States. "Crime" and "Misdemeanor" are synonymous terms; though in common usage crime is used to denote offenses of a more serious nature. However, for example: an insignificant, although illegal act, or the taking of something which is of little or no value, or believed to have been abandoned may not be sufficient to establish that a crime was committed as defined for the application of this section of the Act, even if the claimant was found guilty of a violation of the law.

2. The duty of honesty is implied in any employment relationship. A worker is obligated to deal with his employer in truthfulness and good faith. An individual discharged for dishonesty constituting a crime connected with his work is at fault in his resulting unemployment. The 52 week disqualification for "dishonesty constituting a crime" required by the statute is a mandatory penalty.

3. The basic factors which are essential for a disqualification under this provision of the law are that the individual was discharged for a crime that was:

a. In connection with work

b. Dishonesty

c. Admitted or established by a conviction in a court of law

II. In Connection with Work

The connection to the work is not limited to offenses which take place on the employer's premises or during business hours. The employer does not have to be the victim of the crime, but the crime must adversely affect the employer's rightful interest. It is necessary that the conduct have a "connection" to the employee's duties and to the employer's business that it is a subject of legitimate and significant concern. All employers, both public and private, have the right to expect employees to refrain from acts which are detrimental to the business or would bring dishonor on the business name of the institution. Legitimate interests of employers include, but are not limited to: goodwill of customers, reputation of the business, efficiency, business costs, morale of employees, discipline, honesty, trust and loyalty.

III. Dishonesty

Dishonesty in this context generally means theft but may also include other criminal acts connected with the work that render the employee untrustworthy or show a lack of integrity. Dishonesty not involving a crime may still be disqualifying under provisions of Section 5(b)(1).

IV. Admission or Conviction in a Court

1. An admission is a voluntary acknowledgement made by a claimant that he has committed acts which are in violation of the law. In this context, the admission may be a verbal or written statement by the claimant that he committed the act. The admission does not necessarily have to be made to a Department representative. However, there must be sufficient information to establish that it was not a false statement given under duress or made to obtain some concession.

2. A conviction is when a claimant has been found guilty by a court of committing acts which are in violation of the law. When the claimant pleads "no contest" or agrees to the diversionary program as provided by the court, this is treated, for the purposes of this section of the Act, the same as a conviction and benefits will be denied.

V. Benefits Held in Abeyance

1. If the claimant has not made an admission, but is held in legal custody or free on bail, the law requires a withholding of a determination of eligibility. Benefits cannot be paid unless a determination of eligibility is made. Failure to pay benefits even though the burden of proof for a denial under Section 5(b)(2) has not been met is justified because the court, in holding the claimant in legal custody or establishing bail has made a preliminary ruling that the state has established that a crime has been committed and there is reason to believe the individual committed that crime. The filing of charges is not the same as being held in custody.

2. However, if there is a preponderance of evidence that the act was committed, a denial of benefits should be made under Section 35-4-5(b)(1), if charges have not been filed by the employer within four weeks. In such a case, the decision under Section 35-4-5(b)(1) will advise the claimant that a decision under Section 35-4-5(b)(2) is still pending and the 5(b)(1) disqualification shall be changed to a 5(b)(2) disqualification if the claimant is found guilty by the court. If the claimant has purged a 5(b)(1) disqualification which was or could be assessed pending a ruling by the court, benefits must be held in abeyance until the court reaches the verdict. The claimant has the responsibility to provide the Department with the court's verdict in order to establish eligibility.

3. If a determination of eligibility is held in abeyance the claimant must be notified in a written decision that benefits are being withheld in accordance with Section 35-4-5(b)(2) pending a determination by the court.

1987 35-4-5b2, 35-4-5b1

R475-5c. Failure to Apply for or Accept Suitable Work

NOTES TO DECISIONS

"Workmen's compensation or the occupational disease laws."

"Workmen's compensation or the occupational disease laws" modifies only "this state" and not "federal law" in this section. DeLuca v. Department of Emp. Sec., 746 P.2d 276 (Utah Ct. App. 1987).

Plaintiff may qualify under the statute for the freezing of the base period where the benefits received were federal social security benefits if the benefits were received as compensation for sickness or illness. DeLuca v. Department of Emp. Sec., 746 P.2d 276 (Utah Ct. App. 1987).

35-4-5. Ineligibility for benefits.

An individual is ineligible for benefits or for purposes of establishing a waiting period:

(a) For the week in which the claimant left work voluntarily without good cause, if so found by the commission, and for each week thereafter until the claimant has performed services in bona fide covered employment and earned wages for those services equal to at least six times the claimant's weekly benefit amount. A claimant shall not be denied eligibility for benefits if the claimant leaves work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification.

The commission shall, in cooperation with the employer, consider for the purposes of this chapter the reasonableness of the claimant's actions, and the extent to which the actions evidence a genuine continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience.

Notwithstanding any other provision of this section, a claimant who has left work voluntarily to accompany, follow, or join his or her spouse to or in a new locality does so without good cause for purposes of this subsection.

(b) (1) For the week in which the claimant was discharged for just cause or for an act or omission in connection with employment, not constituting a crime, which is deliberate, willful, or wanton and adverse to the employer's rightful interest, if so found by the commission, and thereafter until the claimant has earned an amount equal to at least six times the claimant's weekly benefit amount in bona fide covered employment.

(2) For the week in which he was discharged for dishonesty constituting a crime in connection with his work as shown by the facts together with his admission, or as shown by his conviction in a court of competent jurisdiction of a crime in connection with that dishonesty and for the 51 next following weeks. If by reason of his alleged dishonesty in connection with his work, the individual is held in legal custody or is free on bail, any determination of his eligibility shall be held in abeyance pending his release or conviction.

(c) If the commission finds that the claimant has failed without good cause to properly apply for available suitable work, to accept a referral to suitable work offered by the employment office, or to accept suitable work offered by an employer or the employment office. The ineligibility continues until the claimant has performed services in bona fide covered employment and earned wages for the services in an amount equal to at

least six times the claimant's weekly benefit amount. A claimant shall not be denied eligibility for benefits for failure to apply, accept referral, or accept available suitable work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification.

The commission shall consider the purposes of this chapter, the reasonableness of the claimant's actions, and the extent to which the actions evidence a genuine continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience.

(1) In determining whether or not work is suitable for an individual, the commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his prior earnings and experience, his length of unemployment and prospects for securing local work in his customary occupation, the wages for similar work in the locality, and the distance of the available work from his residence.

Prior earnings shall be considered on the basis of all four quarters used in establishing eligibility and not just the earnings from the most recent employer. The commission shall be more prone to find work as suitable the longer the claimant has been unemployed and the less likely the prospects are to secure local work in his customary occupation.

(2) Notwithstanding any other provision of this chapter, no work is suitable, and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(i) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(ii) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(iii) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(d) For any week in which the commission finds that his unemployment is due to a stoppage of work which exists because of a strike involving his grade, class, or group of workers at the factory or establishment at which he is or was last employed.

(1) If the commission finds that a strike has been fomented by a worker of any employer, none of the workers of the grade, class, or group of workers of the individual who is found to be a party to the plan, or agreement to foment a strike, shall be eligible for benefits. However, if the commission finds that the strike is caused by the failure or refusal of any employer to conform to the provisions of any law of the state of Utah or of the United States pertaining to hours, wages, or other conditions of work, the strike shall not render the workers ineligible for benefits.

(2) If the commission finds that the employer, his agent or representative has conspired, planned, or agreed with any of his workers,

their agents or representatives to foment a strike, that strike shall not render the workers ineligible for benefits.

(3) A worker may receive benefits if, subsequent to his unemployment because of a strike as defined in Subsection (d), he has obtained employment and has been paid wages of not less than the amount specified in Subsection 35-4-3(d) and has worked as specified in Subsection 35-4-4(f). During the existence of the stoppage of work due to this strike the wages of the worker used for the determination of his benefit rights shall not include any wages he earned from the employer involved in the strike.

(e) For each week with respect to which the claimant willfully made a false statement or representation or knowingly failed to report a material fact to obtain any benefit under the provisions of this act, and an additional 13 weeks for the first week the statement or representation was made or fact withheld and six weeks for each week thereafter; the additional weeks not to exceed 49 weeks. The additional period shall commence on the Sunday following the issuance of a determination finding the claimant in violation of this subsection. Each individual found in violation of this subsection shall repay to the commission the amount of benefits the claimant actually received and, as a civil penalty, an amount equal to the benefits the claimant received by direct reason of his fraud. The penalty amount shall be regarded as any other penalty under this chapter. These amounts shall be collectible by civil action or warrant in the manner provided in Subsections 35-4-17(c) and (e). A claimant is ineligible for future benefits or waiting week credit if any amount owed under this subsection remains unpaid.

Determinations under this subsection shall be made only upon a sworn written admission of the claimant or after due notice and recorded hearing. If a claimant waives the recorded hearing, a determination shall be made based upon all the facts which the commission, exercising due diligence, has obtained. Determinations by the commission are appealable in the manner provided by this act for appeals from other benefit determinations.

(f) For any week with respect to which or a part of which he has received or is seeking unemployment benefits under an unemployment compensation law of another state or the United States. If the appropriate agency of the other state or of the United States finally determines that he is not entitled to those unemployment benefits, this disqualification does not apply.

(g) (1) For any week in which he is registered at and attending an established school, or is on vacation during or between successive quarters or semesters of school attendance, unless the major portion of his wages for insured work during his base period was for services performed while attending school. Notwithstanding the foregoing provisions of this subsection, an otherwise eligible individual is not ineligible to receive benefits while attending a part-time training course. An otherwise eligible individual shall not be denied benefits for any week because he is in training with the approval of the commission, and that individual is not ineligible to receive benefits by reason of nonavailability for work, failure to search for work, refusal of suitable work, or failure to apply for or to accept suitable work

with respect to any week he is in training with the approval of the commission.

(2) Notwithstanding any other provision of this chapter, no otherwise eligible individual shall be denied benefits for any week because he is in training approved under Section 236(a)(1) of the Trade Act of 1974, nor shall he be denied benefits for leaving work to enter that training, provided the work left is not suitable employment, or because of the application to any such week in training of provisions in this law or any applicable federal unemployment compensation law relating to availability for work, active search for work, or refusal to accept work.

For purposes of this subsection, "suitable employment" means work of a substantially equal or higher skill level than the individual's past adversely affected employment, as defined for purposes of the Trade Act of 1974, and wages for that work at not less than 80% of the individual's average weekly wage as determined for the purposes of the Trade Act of 1974.

(h) For any week with respect to which he is receiving, has received, or is entitled to receive remuneration in the form of:

(1) wages in lieu of notice, or a dismissal or separation payment; or

(2) accrued vacation or terminal leave payment.

If the remuneration is less than the benefits which would otherwise be due, he is entitled to receive for that week, if otherwise eligible, benefits reduced as provided in Subsection 35-4-3(c).

(i) (1) For any week in which the individual's benefits are based on service for an educational institution in an instructional, research, or principal administrative capacity and which begins during the period between two successive academic years, or during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract if the individual performs services in the first of those academic years or terms and if there is a contract or reasonable assurance that the individual will perform services in any such capacity for an educational institution in the second of the academic years or terms.

(2) For any week in which the individual's benefits are based on service in any other capacity for an educational institution, and which week begins during a period between two successive academic years or terms if the individual performs those services in the first of the academic years or terms and there is a reasonable assurance that the individual will perform the services in the second of the academic years or terms. If compensation is denied to any individual under this subparagraph and the individual was not offered an opportunity to perform such services for the educational institution for the second of such academic years or terms, the individual shall be entitled to a retroactive payment of compensation for each week for which the individual filed a timely claim for compensation and for which compensation was denied solely by reason of this subparagraph.

(3) With respect to any services described in Subsections (i)(1) or (2), compensation payable on the basis of those services shall be denied to an individual for any week which commences during an established and customary vacation period or holiday recess if the indi-

vidual performs the services in the period immediately before the vacation period or holiday recess, and there is a reasonable assurance that the individual will perform the services in the period immediately following the vacation period or holiday recess.

(4) With respect to services described in Subsection (i)(1) or (2), compensation payable on the basis of those services as provided in Subsection (i)(1), (2), or (3) shall be denied to an individual who performed those services in an educational institution while in the employ of an educational service agency. For purposes of this Subsection (i)(4), "educational service agency" means a governmental agency or entity established and operated exclusively for the purpose of providing the services described in Subsection (i)(1) or (2) to an educational institution.

Benefits based on service in employment defined in Subsections 35-4-22(j)(2)(D) and (E) are payable in the same amount, on the same terms and subject to the same conditions as compensation payable on the basis of other service subject to this chapter.

(j) For any week which commences during the period between two successive sport seasons or similar periods if the individual performed any services, substantially all of which consists of participating in sports or athletic events or training or preparing to participate in the first of those seasons or similar periods and there is a reasonable assurance that individual will perform those services in the later of the seasons or similar periods.

(k) (1) For any week in which the benefits are based upon services performed by an alien, unless the alien is an individual who has been lawfully admitted for permanent residence at the time the services were performed, was lawfully present for purposes of performing the services or, was permanently residing in the United States under color of law at the time the services were performed, including an alien who is lawfully present in the United States as a result of the application of Subsection 203(a)(7) or Subsection 212(d)(5) of the Immigration and Nationality Act.

(2) Any data or information required of individuals applying for benefits to determine whether benefits are not payable to them because of their alien status shall be uniformly required from all applicants for benefits.

(3) In the case of an individual whose application for benefits would otherwise be approved, no determination that benefits to the individual are not payable because of his alien status shall be made except upon a preponderance of the evidence.

History: L. 1941, ch. 40, § 5; C. 1943, 42-2a-5; L. 1949, ch. 53, § 1; 1951, ch. 50, § 1; 1955, ch. 60, § 1; 1959, ch. 57, § 1; 1963, ch. 52, § 1; 1971, ch. 78, § 4; 1971, ch. 79, § 1; 1976, ch. 19, § 2; 1977 (1st S.S.), ch. 3, § 3; 1979, ch. 137, § 3; 1982, ch. 78, § 4; 1983 (1st S.S.), ch. 20, § 3; 1984 (2nd S.S.), ch. 18, § 1; 1985, ch. 232, § 2; 1987, ch. 81, § 3; 1987, ch. 92, § 49.

Amendment Notes. — The 1984 (2nd S.S.) amendment, effective April 6, 1984, substituted numbers for letters and vice versa as subsection designations; inserted "Subsection (9)(a) or (b)" in each sentence of subsection (9)(b); substituted "Subsections (9)(a) or (b)" for "clause (1) or (2)" in subsection (9)(c); inserted subsection (9)(d); and made minor changes in phraseology, punctuation and style.

The 1985 amendment redesignated the formerly numbered subsections as lettered subsections, and vice versa; deleted bracketed subheadings preceding each of Subsections (a)

BOARD OF REVIEW
The Industrial Commission of Utah
Unemployment Compensation Appeals

JLF/NB/LB/cam

KEVIN R. JOHNSON
S.S.A. No. 523-17-6731 :

: Case No. 88-A-0368

: DECISION

: Case No. 88-BR-086

DEPARTMENT OF EMPLOYMENT SECURITY :

The employer, Morton Thiokol, appeals the decision of the Administrative Law Judge in the above-entitled matter which held that the claimant, Kevin R. Johnson, had been discharged from his employment with the employer for reasons that are not disqualifying under §35-4-5(b)(1) of the Utah Employment Security Act. The ALJ's decision therefore allowed payment of unemployment benefits to the claimant effective December 20, 1987 and continuing, provided he is otherwise eligible. The ALJ's decision also held the employer liable for benefit charges pursuant to §35-4-7(c) of the Act.

After careful consideration of the record in this matter, the Board of Review reverses the decision of the Administrative Law Judge and denies payment of benefits on the grounds the claimant was discharged from his employment for reasons that are disqualifying under §35-4-5(b)(1) of the Utah Employment Security Act.

In reversing the decision of the ALJ, the Board of Review notes that, as in its prior decision in #88-BR-31, involving the same employer, the employer's rule was reasonable and its application to the claimant was fair. After being involved in an accident the claimant was drug tested in accordance with company policy. The test results were positive. The company reviewed the situation and concluded that Mr. Johnson was not at fault in the accident and therefore did not terminate him even though the drug test results were positive. Rather, the employer referred the claimant to the employee assistance program for counselling. He was advised he was subject to random testing during the next 12 month period. On November 25, 1987, 65 days after the initial positive test result, the claimant was selected for an additional drug testing. He again tested positive for marijuana use.

The Board of Review finds the claimant's testimony that he did not use marijuana again after the first test to not be credible. Although, by his own admission the claimant continued to live in an environment where marijuana was illegally consumed on a daily basis by his roommates, the Board of Review does not agree that passive inhalation alone was sufficient to account for the positive results on the second test.

Employers have a responsibility to ensure a safe workplace for their employees and also to produce products that are, insofar as possible, free of hidden defects. This employer's drug policy and the manner in which it was applied promote those laudible objectives. This Board will not undermine those objectives by allowing unemployment benefits to those who have been discharged for violating an employer's reasonable policy or rule respecting the use of illegal drugs. The employer is therefore relieved of benefit charges as provided by §35-4-7(c)(3)(F) of the Utah Employment Security Act.

This decision creates an overpayment in the amount of $3,618.00. The claimant is not at fault in the creation of this overpayment. Therefore, the claimant is not liable to repay the overpayment but is liable to have it deducted from any future benefits payable to him during his current benefit year.

This decision will become final ten days after the date of mailing hereof, and any further appeal must be made directly with the Court of Appeals, Midtown Plaza, 230 South 500 East, Suite 400, Salt Lake City, Utah, within ten days after this decision becomes final. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §35-4-10(i) of the Utah Employment Security Act, followed by a Docketing Statement and a Legal Brief.

Dated this 10th day of May, 1988.

Date Mailed: May 12, 1988.

BOARD OF REVIEW

I hereby certify that I caused a true and correct copy of the foregoing DECISION to be served upon each of the following on this 12th day of May, 1988 by mailing the same, postage prepaid, United States mail to:

R. E. HARRINGTON
For: Morton Thiokol
Attn: Debbie St. Clair
P. O. Box 1160
Columbus, OH 43216

Kevin R. Johnson
3755 Grant Avenue
Ogden, UT 84401

Cherie D. Morgan

BOARD OF REVIEW
The Industrial Commission of Utah
Unemployment Compensation Appeals

JLF/NB/LB/cdm

KEVIN R. JOHNSON
S.S.A. No. 528-17-6731 :

: Case No. 88-A-0368

: DECISION

: Case No. 88-BR-086

DEPARTMENT OF EMPLOYMENT SECURITY :

Subsequent to its decision dated May 10, 1988 and mailed May 12, 1988, the Board of Review received a letter from the claimant's attorney, David Bert Havas, wherein Mr. Havas requested the Board of Review to reconsider its decision on the grounds that he was never notified of the employer's appeal and was not given an opportunity to submit written argument in favor of the decision of the Administrative Law Judge, which decision allowed benefits to the claimant and was reversed by the Board of Review. Mr. Havas requested an opportunity to submit written argument for the Board's reconsideration.

This request by Mr. Havas was granted by the Board of Review which has now received Mr. Havas' memorandum in support of affirmance of the Administrative Law Judge's decision awarding benefits to the claimant.

After carefully considering the evidence of record in this matter, the appeal of the employer, and the written arguments of claimant's counsel, the Board of Review remands this matter to the ALJ to take new evidence as hereinafter set forth, pursuant to the provisions of Section 35-4-10(d)(2)(C)(2)(a) of the rules of the Department which provide in pertinent part:

> The Board may also remand a matter for the taking of new evidence if, in the discretion of the Board, such evidence is of particularly significant importance that the Board determines its inclusion in the record is necessary for proper administration of the Act.

In reviewing the testimony and other evidence of record in this case, the Board of Review is satisfied that the employer has followed the requirements of the Utah Drug and Alcohol Testing Statute while testing the claimant for controlled substances (illegal drugs). The claimant has tested positive for the presence of controlled substances in his system on both

September 21st and November 25th of 1987. The claimant has admitted the use of marijuana prior to the first test on September 21, 1987 but has denied under oath that he used any marijuana between the test in September and the test in November. He testified the test results were 1.23 on the September test and .25 on the November test. He cites the difference in his test results as supportive of his claim that he did not use marijuana between the two tests. He attributes the positive result on the November test to either being a residual of his usage of marijuana prior to the September test or to passive inhalation as a result of the daily marijuana smoking of his two roommates in his presence.

Neither the employer nor the claimant presented expert testimony regarding the drug test results, or the significance of the apparent decrease from 1.23 to .25 in the test results as indicated by the claimant. Without expert testimony as to the meaning of the test results, the Board of Review is unable to determine whether the 65 days between the September test and the November test was sufficient time for the tested drug to clear the claimant's body, and if so, the possibilities of the claimant testing positive as a result of passive inhalation while in the same room with others who are smoking marijuana.

The Board of Review therefore requests the ALJ to reopen the hearing and call as an expert witness Ellwood Loveridge, PhD, Director of Scientific Support Services for the Salt Lake County Health Department. Dr. Loveridge can be reached at phone number 534-4564. The notice of the reopened hearing should be sent to Dr. Loveridge as well as to the claimant and the employer. Dr. Loveridge should be given the option of testifying in this matter by telephone. The claimant and the employer shall each be given the opportunity to cross-examine Dr. Loveridge as to his interpretation of the drug test results and to offer additional expert testimony in rebuttal if they care to do so. The employer is also requested to have the lab people who ran the tests in behalf of the employer available to testify as to their procedures and the test results of both the September and the November tests of the claimant so that Dr. Loveridge will be able to provide his interpretation of those test results for the record. At the close of the reopened hearing, the ALJ is requested to have the testimony transcribed and forwarded to the Board of Review for a final decision.

BOARD OF REVIEW

Dated this 27th day of September, 1988.

Date Mailed: October 14, 1988.

I hereby certify that I caused a true and correct copy of the foregoing DECISION to be served upon each of the following on this 12th day of October, 1988 by mailing the same, postage prepaid, United States mail to:

R.E. Harrington
For: Morton Thiokol
Attn: Debbie St. Clair
P. O. Box 1160
Columbus, OH 43216

Kevin R. Johnson
3755 Grant Avenue
Ogden, UT 84401

Cherie D. Morgan

BOARD OF REVIEW
The Industrial Commission of Utah
Unemployment Compensation Appeals

JLF/NB/LB/cdm

KEVIN R. JOHNSON
S.S.A. No. 528-17-6731 :

: Case No. 88-A-0368

: DECISION

: Case No. 88-BR-428

DEPARTMENT OF EMPLOYMENT SECURITY :

Subsequent to its decision dated May 10, 1988 and mailed May 12, 1988, the Board of Review received a letter from the claimant's attorney, David Bert Havas, wherein Mr. Havas requested the Board of Review to reconsider its decision on the grounds that he was never notified of the employer's appeal and was not given an opportunity to submit written argument in favor of the decision of the Administrative Law Judge, which decision allowed benefits to the claimant and was reversed by the Board of Review. Mr. Havas requested an opportunity to submit written argument for the Board's reconsideration.

This request by Mr. Havas was granted by the Board of Review. After receiving Mr. Havas' memorandum in support of affirmance of the Administrative Law Judge's decision awarding benefits to the claimant, the Board of Review remanded this case to the ALJ to take additional evidence. In the remand decision dated September 27, 1988 and mailed October 14, 1988, the Board of Review requested that the additional testimony be transcribed and forwarded to the Board of Review for a final decision. The Board of Review has now received the additional evidence.

After carefully considering the evidence of record in this matter, the appeal of the employer, and the written arguments of claimant's counsel, the Board of Review respectfully declines to reverse its decision dated May 10, 1988 and mailed May 12, 1988.

In declining to reverse its May 10, 1988 decision, the Board of Review makes the following additional comments and findings of fact based on the October 26, 1988 reopened hearing before the ALJ.

The Board of Review notes that the claimant's attorney objected to Dr. Loveridge being accepted as an expert witness in this case on the grounds that Dr. Loveridge was not qualified as an analytical chemist dealing with the testing of marijuana in the human body and how long marijuana residue remains in the human body. After carefully considering Dr. Loveridge's answers to Mr. Havas' questions regarding his experience and expertise with respect to marijuana testing, the Board of Review sustains Mr. Havas' objections and therefore disregards Dr. Loveridge's testimony in this matter.

The employer called Dr. Kerr of its medical services unit as a witness in this matter. While Dr. Kerr acknowledged that he is not a specialist in the field of human toxicology, he testified that he did have knowledge about the length of time that marijuana residue or cannabinoids remains in the human body.

Dr. Kerr testified that the claimant's first test on September 21st reported positive for 128 nanograms per milliliter for cannabinoids. The second test on November 25th again tested positive for cannabinoids at 25 nanograms per milliliter. The required confirmation tests were run on the samples provided by the claimant on each of those dates. Dr. Kerr testified the threshold or cutoff point on the preliminary screen test is 20 nanograms per milliliter and 6 nonograms per milliliter on the confirmation or gas chromatography test. Therefore, the 25 nanograms per milliliter measured on the claimant's November 25th test breached the threshold for a positive test. Dr. Kerr acknowledged that the 25 nanograms per milliliter result of the claimant's November 25th test was significantly lower than the 128 nanograms per milliliter from the claimant's September 21st test. He acknowledged that he could not predict how long before the 25 nanogram level was found that the last exposure to marijuana occurred. He acknowledged that there is a prolonged time in which a test for cannabinoids will remain positive. He did not believe, however, that the test would remain positive on November 25th, 1987, if the claimant had not encountered further exposure to marijuana since September 21, 1987. Dr. Kerr also acknowledged that there is some evidence to indicate that extreme exposure to passive inhalation can cause a positive test result, such as three or four hours in a closed car or a small room with three to six people heavily smoking marijuana. He knew of no scientific studies that would indicate whether prolonged exposure such as experienced by the claimant living with other individuals who frequently used marijuana could result in a positive test. Dr. Kerr testified that marijuana can be detected in the body for several weeks after its use, but noted that by several weeks he meant four to six weeks. He stated he was not personally aware of any studies where positive tests resulted after a longer period of time.

Dr. Kerr testified that follow-up tests of employees who have tested positive on a first test are not administered until at least six weeks have passed. He stated the six week period was arrived at on the recommendation of the Center for Human Toxicology at the University of Utah. The Center for Human Toxicology felt that anyone who wasn't continuing exposure to marijuana would test negative after six weeks.

Based on the testimony of Dr. Kerr, the Board of Review finds the testimony of the claimant wherein he denied continued use of marijuana after the September 21, 1987 test to not be credible. The Board of Review finds that if the claimant had discontinued the use of marijuana after the September 21, 1987 test, he would have tested negative when tested again 65 days later on November 25, 1987.

In 1987, the Utah State Legislature passed a drug and alcohol testing statute with the following declared purpose and intent as found in Section 34-38-1 of the Utah Drug and Alcohol Testing Act:

> 34-38-1. Legislative findings - Purpose and intent of chapter.
>
> The Legislature finds that a healthy and productive work force, safe working conditions free from the effects of drugs and alcohol, and maintenance of the quality of products produced and services rendered in this state, are important to employers, employees, and the general public. The Legislature further finds that the abuse of drugs and alcohol creates a variety of workplace problems, including increased injuries on the job, increased absenteeism, increased financial burden on health and benefit programs, increased workplace theft, decreased employee morale, decreased productivity, and a decline in the quality of products and services.
>
> Therefore, in balancing the interests of employers, employees, and the welfare of the general public, the Legislature finds that fair and equitable testing for drugs and alcohol in the workplace, in accordance with this chapter, is in the best interest of all parties.
>
> The Legislature does not intend to prohibit any employee from seeking damages or job reinstatement, if action was taken by his employer based on a false drug or alcohol test result.

The Board of Review finds the employer's alcohol and drug policy to be consistent with and in compliance with the Utah Drug and Alcohol Testing Act. On the other hand, by his own admissions in this record, the claimant appears to have violated Section 58-37-8(2)(a)(iii) of the Utah Controlled Substances Act, which provides:

> 58-37-8. Prohibited acts - Penalties.
>
> (1) Prohibited acts B - Penalties:
>
> (a) It is unlawful:
>
> (iii) for any person knowingly and intentionally to be present where controlled substances are being used or possessed in violation of this chapter and the use or possession is open, obvious, apparent, and not concealed from those present; however, a person may not be convicted under this subsection if the evidence

snows that he did not use the substance himself or advise, encourage, or assist anyone else to do so; any incidence of prior unlawful use of controlled substances by the defendant may be admitted to rebut this defense; . . .

Although the claimant contends he did use marijuana after the first test on September 21, 1987, the positive results of the second test on November 25, 1987, together with his admission that he continued to live with two roommates who consumed marijuana in his presence every day and that he was thus exposed to marijuana smoke three or four times a night, leads the Board of Review to a conclusion that the claimant's denial of marijuana use following the September test is not credible. The claimant has admitted using marijuana prior to the September test. The Board of Review is not convinced that the claimant discontinued his personal use of marijuana after the September test where he continued to live in an environment where marijuana was used three or four times a night on a daily basis by the claimant's roommates. The November test results indicate otherwise. There is nothing in the record of this case to convince the Board of Review that passive innalation, under the circumstances described by the claimant, which appears to violate the Utah Controlled Substances Act, as noted above, is any less culpable or harmful in its effect than direct innalation of marijuana smoke.

The Board of Review therefore declines to undermine the laudible objectives of the Utah Drug and Alcohol Testing Act, the Utah Controlled Substances Act, and this employer's drug and alcohol policies by allowing unemployment insurance benefits to one who has lost his employment through a willful violation of his employer's drug and alcohol policy.

This decision becomes final on the date it is mailed, and any further appeal must be made within 30 days from the date of mailing. Your appeal must be submitted in writing to the Utah Court of Appeals, Midtown Plaza, 230 South 500 East, Suite 400, Salt Lake City, Utah. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §§63-46b-16 of the Utah Administrative Procedures Act and Rule 14 of the Rules of the Utah Court of Appeals, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Rules of the Utah Court of Appeals.

NW

BOARD OF REVIEW

Dated this 30th day of December, 1988.

Date Mailed: December 8, 1988.

I hereby certify that I caused a true and correct copy of the foregoing DECISION to be served upon each of the following on this 8th day of December, 1988 by mailing the same, postage prepaid, United States mail to:

David Havas
Attorney at Law
For: Kevin Johnson
2604 Madison Avenue
Ogden, UT 84401

Kevin R. Johnson
2535 Porter, Apt. #2
Ogden, UT 84401

Ms. Debbie St. Clair
R. E. Harrington
P. O. Box 1160
Columbus, OH 43216

James Fox
Employer Relations Representative
Morton Thiokol
P. O. Box 524
Brigham City, UT 84302

Connie Dumas

CERTIFICATE OF SERVICE

I certify that I caused four true and correct copies of the foregoing Brief of Petitioner to be deposited in the United States Mail, postage prepaid, to:

Allan L. Hennebold
Attorney for Respondents
1234 South Main Street
P. O. Box 11600
Salt Lake City, Utah 84147

On this 30th day of June, 1989.